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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0729 A.C. No. 02-01049-416209
PINTO VALLEY MINING CORP., Respondent.	Mine: Pinto Valley Mine

DECISION DENYING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act). On April 25, 2017, the Secretary filed a motion to approve settlement ("Secretary's motion" or "Motion").

The Court has considered the representations submitted in this case and, applying section 110(k) of the Act, finds the proffered settlement wanting. Two citations are problematic.[1] The two citations for which insufficient information was provided are Citation Nos. 9302206 and 8934146.

Regarding Citation No. 9302206, a section 104(a) citation alleging a violation of 30 C.F.R. § 56.9300(a), the inspector related,

> SX Non potable and potable water service tank road access. The berm on the south side of the circular roadway has sloughed from wet weather leaving a section of road without a berm. Two traffic cones demarcating the slough have fallen over the edge. Truck tire tracks are approx.. **2 ft. from the edge**. The operator states **the road is accessed daily** by pick up [sic] truck for tank measurement. Should normal operations continue, persons would be exposed to an approx. **40 - 50 ft. rollover hazard down the hillside**.

Citation No. 9302206 (emphasis added).

The Secretary's motion sought a 50% reduction in the penalty amount for this citation. Although the Respondent asserted plausible mitigating contentions, that "the cited condition was

[1] There are four citations at issue in this matter. Two are not discussed here: Citation Nos. 8934539 and 8934544, which the Respondent agreed to pay as assessed with no modification to either as part of the proposed settlement.

not likely to result in an injury because the cited location was wide and infrequently traveled, there is one truck in the area at a time, and it travels at only 5 mph," the Secretary offered no useful comment to those contentions. Motion at 2. Instead, the Secretary stated only that he "would have presented evidence *supporting the citation as written*." *Id*. (emphasis added). The Secretary then continues, "nevertheless, without admitting that Respondent's arguments are relevant or persuasive, [he] agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from Significant and Substantial ("S&S") to Non-S&S, and agrees to reduce the penalty from $2,398.00 to $1,200.00." Motion at 2-3.

Accordingly, the Secretary has provided absolutely nothing to support the reduction. To the contrary, the Secretary did not even concede that the Respondent presented *legitimate* issues of fact that can be resolved only by going to hearing. One needs to put this insufficient statement in further context by appreciating that the Secretary's offering, if it can be described as such, is his *fallback* position. The Secretary's initial position on settlements remains that he "has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above." Motion at 2.

It is only after announcing his primary position, that ***the Secretary*** *has determined how the Mine Act is best served through his settlement*, that he acknowledges that the Commission has issued a "recent decision" finding that the Commission's procedural rules require support for settlements.[2] *Id*. (emphasis added). In that context, the Secretary then "presents… information in support of the penalties agreed to by the parties." *Id*. Though the language suggests that "information in support of the penalties" will then be provided in the motion, the only mitigating factual assertions come from the Respondent, as the Secretary, with no congruity between the parties at all, simply announces that he "agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from Significant and Substantial ("S&S") to Non-S&S, and agrees to reduce the penalty from $2,398.00 to $1,200.00." Motion at 3. Why the Secretary so agrees to the proposed changes is never explained. In fact, discordantly, the Secretary asserts that he would have presented evidence supporting the citation as was written, and does not admit that the reasons advanced by the Respondent are persuasive, or even relevant.

Simply stated, a settlement motion such as this cannot be approved when only the mine operator advances claimed mitigating factors and the Secretary offers no comment in support of such claims and exacerbates that shortcoming by taking matters a step further, denying that the claimed mitigating factors are persuasive or relevant.

[2] This presumably refers to *The American Coal Company*, which reaffirmed that Congress authorized the Commission to review in detail settlements of contested civil penalties before approving them. *The American Coal Co*., 38 FMSHRC 1972 (Aug. 2016) (citing *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)).

If one were to try to present such a motion mathematically, it might appear in this manner:

> Mine operator's representations about facts that may mitigate a violation – Secretary failure to concede presence of genuine factual dispute regarding operator's representations + no additional information from the Secretary about those representations = invalid settlement.

For the other matter, Citation No. 8934146, the Secretary takes the same approach as he did in the previous citation, this time seeking a 28% penalty reduction. Though the penalty reduction is different, the playbook is the same. The citation alleges,

> [a] ¾ inch water hose was strung out on the ground level pad on the North side of the Fine Ore Crushing building in front of the stairway to the Crusher Motor Level. The hose was elevated off the floor on one end and coiled up in a pile on the other side about three feet from the bottom of the steps to the Crusher Motor Level. This condition exposed workers accessing the stairway to a slip, fall hazard that could cause a serious injury.

Citation No. 8934146.

After making the condition sound less serious, describing it only as "a hose in front of a stairway," the Secretary's Motion states, the "Respondent would have argued at hearing for modification of the citation's gravity designations because, Respondent argues, the hose was easily visible and did not present a tripping hazard." Motion at 3. The Court observes that these are plausible reasons to support a reduced penalty and changes to the gravity determinations listed by the issuing inspector. However, as just noted, hearing only from one side is insufficient in matters of proposed settlements. Indeed, the idea behind a settlement often is that the parties acknowledge some legitimate disputes about the facts. This means that the Court must hear from both sides. Yet, employing his formulaic response, the Secretary again only recites his routine statement that he "would have presented evidence supporting the citation *as written*." *Id*. (emphasis added). Then, as before, the Secretary continues that, "nevertheless, without admitting that Respondent's arguments are relevant or persuasive, [he] agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from S&S to Non-S&S, and agrees to reduce the penalty from $722.00 to $520.00." *Id*. As there is no explanation provided by the Secretary for the gravity modifications, nor for the penalty reduction, this proposed settlement is also inadequately supported.

WHEREFORE, the motion for approval of settlement, being deficient, is **DENIED**. This matter must now be set for hearing.[3]

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[3] Setting a matter for hearing does not foreclose the parties' option to submit a new, adequately supported motion for approval of settlement. However, this possibility is an insufficient basis to postpone establishing a hearing date.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2016-0621 A.C. No. 46-04236-419753
SEMINOLE COAL RESOURCES, LLC, Respondent.	Mine: Maple Eagle No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement. The originally assessed amount was $5,338.00, and the proposed settlement is for $3,737.00. The Secretary also requests that the single citation at issue be modified, as indicated below.

The Secretary presents the following basis for the proposed changes to Citation No. 9111506, which alleged a violation of 30 C.F.R. § 75.220(a)(1):

> The Respondent contends that the Section Foreman examined the working places and found no issues in the #5 entry. The Respondent also contends that four reflectors were hung in the crosscut and entry as required by the plan but that the inspector did not agree with the location of the reflectors. The Respondent would also argue if this matter went to hearing that it was not reasonably likely that anyone would travel inby the unsupported roof and, therefore, the citation should not have been designated as S&S. In light of these arguments and recognizing the uncertainty of the outcome of these issues, the Secretary agrees to the above modification and penalty reduction.

Motion at 3.

Again, we see the 30% reduction the Secretary seems to be offering with frequency. In this instance, the Court will infer that the Secretary is admitting that there are legitimate questions of fact raised by the Respondent, though for some reason the Secretary is reticent to admit this frontally, relying instead upon his wording that "[i]n light of these arguments and recognizing the uncertainty of the outcome of these issues, the Secretary agrees to the above modification and penalty reduction." *Id.*

With the comments above in mind, the Court has considered the representations submitted in this case and, with those, the implicit acknowledgement by the Secretary that the Respondent's representations present legitimate issues of fact. Working under that inference, the Court concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
9111506	$5,338.00	$3,737.00
TOTAL:	**$5,338.00**	**$3,737.00**

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9111506 be **MODIFIED** to a section 104(a) citation, with a high negligence designation.

It is further **ORDERED** that Respondent pay a penalty of $3,737.00 within 30 days of this order.[1] Upon receipt of payment, this case is **DISMISSED**.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[1] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

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June 5, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. NALLY & HAMILTON ENTERPRISES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2016-439 A.C. No. 15-19757-415241 Mine: Day Branch

DECISION

Appearances: Mary Sue Taylor, U.S. Department of Labor, Office of the Solicitor
618 Church Street, Suite 230, Nashville, Tennessee 37219

S. Thomas Hamilton, Nally & Hamilton Enterprises, Inc., 212 East Stephen Foster Avenue, Bardstown, Kentucky 40004

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Nally & Hamilton Enterprises, Inc. ("NHE" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801. This case involves Citation No. 8409739, issued on December 16, 2016 for an assessed penalty of **$634.00**. The citation was designated as significant and substantial (S&S), highly likely to result in lost workdays or restricted duty, and the result of NHE's moderate negligence.

The parties presented testimony and documentary evidence at a hearing held in London, Kentucky on March 2, 2017. MSHA Inspector David Faulkner testified for the Secretary. Day Branch Mine Foreman Mike Shackleford testified for Nally & Hamilton. After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden in establishing the violation and gravity as written in the citation. I reduce Nally and Hamilton's negligence from moderate to low and assess a penalty of **$500.00**.

II. STIPULATIONS OF FACT

The parties entered the following stipulations of fact into the record at hearing:

1. Nally and Hamilton Enterprises, Inc., extracts and produces coal for resale in interstate commerce at its Day Branch surface mine. *See* Tr. 8.

2. Nally and Hamilton Enterprises, Inc., is an operator as defined by the Federal Mine Safety and Health Act of 1977 and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges. *Id*.

3. The Day Branch surface mine reported that it had 33 to 35 employees working 99,823 hours and producing 310,980 tons of coal in 2016. *Id*.

4. The civil money penalty as assessed will not affect the ability of Nally and Hamilton Enterprises, Inc., to continue in business. *Id*.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

On December 16, 2016, MSHA Inspector David Faulkner[1] visited Respondent's Day Branch Mine ("Mine") to perform a routine inspection. Tr. 13. Prior to the inspection, Faulkner reviewed the Mine's ground control plan, in which the mine operator lists the type of mining, the seams they will mine, and any provisions the operator will follow at that specific mine. Tr. 14–15. The provisions at issue in this case (Items 6 and 7) only apply to haul roads, which the plan defines as roads where coal or mining rock trucks normally operate. *See* Ex. 3 at 14. Item 6 requires haul roads to have a grade below the manufacturer-recommended maximum for the trucks using the road. Tr. 28; Ex. 3 at 14. If there is no recommended maximum, then the road grade must be no greater than 15%. *Id*. Item 7 requires roads with grades greater than 10% to have additional safety precautions, including signs warning of steep grades and a reduced speed limit, runaway ramps, and berms at least two feet tall. Tr. 28–29, 69; Ex. 3 at 14.

Once at the Mine, Faulkner and his supervisor traveled from the parking lot up past the Creech coal seam and up to a drill bench. Tr. 16–18. On the way up, Faulkner did not see anything that made him think the road was a haul road, but later noticed that the coal seam had been mined at some point. Tr. 42, 19–20. The amount of exposed highwall signaled that about a month's worth of mining had been completed. Tr. 58–59. Faulkner thought that Respondent had recently mined the highwall because mine management added the Creech coal seam to the ground control plan roughly two months prior to Faulkner's visit. Tr. 26–27. Faulkner testified that Day Branch Mine Foreman Mike Shackleford "insinuated" that trucks had hauled coal from the seam using the road, but Faulkner did not include that fact in his notes from that day or in the

[1] David Faulkner has worked as a mine inspector for MSHA for over 11 years and worked in the mining industry for 17 years prior to that. Tr. 11–12. He is licensed as a surface mine foreman in Kentucky and as an open pit mine foreman in Tennessee. Tr. 12. Faulkner has also completed all courses required for MSHA inspectors on topics such as accident investigation, impoundment specialist training, and regular mine inspection. Tr. 13.

citation he issued. Tr. 24–25, 31–32, 41. Shackleford later testified at hearing that NHE had removed between 25 and 30 loads of coal from the Creech seam. Tr. 73.

Faulkner determined that the road was a haul road because of the coal seam's location relative to the rest of the equipment. Tr. 35–36. The cited road was the only way he could see to haul coal out from the seam, and he inferred that Respondent had used the cited road to haul it out. Tr. 27, 54. However, the only truck that used the road the day of the inspection was the powder truck, and Faulkner said that Respondent did not haul coal that day. Tr. 50-51.

Returning from the drill bench, Faulkner stopped roughly halfway down the road to take pictures and measure the road grade. Tr. 20–21. He used an Abney level and a laser rangefinder to measure the grade from the road's halfway point to the Creech coal seam at 25%. Tr. 29–31. Faulkner requested the powder truck's manufacturer-recommended grade maximum but found they had not been provided, so the ground control plan's prescribed 15% maximum applied. Tr. 34–35; Ex. 3 at 14. He did not ask for the coal truck's recommended maximum because in his experience the manufacturer normally did not provide it, in which case the 15% maximum would also apply. *Id*.

Shackleford testified that he measured the road grade at 13% and that the road grade was in compliance with the ground control plan when Respondent was hauling coal the week before the inspection. Tr. 70–71. Shackleford attributed any increase in road grade to a construction project on the road at the time of the inspection, which pushed materials across the road with a bull dozer and raised the grade. Tr. 70–71. He told Faulkner that they were widening the road and reducing the grade by pushing out the material. Tr. 43–44, 66–68. However, Shackleford later testified that the work they were doing on the road would only change the road's appearance and not the grade. Tr. 77. He also testified that the grade of the portion of the road in Faulkner's photographs did not change since Respondent used the road to haul coal. Tr. 22, 75–77. Based on the mountain's terrain and elevation and how the road was cut into the mountain, Faulkner believed that the road's grade had never been compliant. Tr. 27, 55.

In addition to being too steep, Faulkner also alleged that the cited road provided none of the safety features listed in Item 7. Tr. 33–34. The road did not have a speed limit sign, but did have a sign at the top of the hill that warned drivers to use lower gears. Tr. 71–72. This sign did not specifically warn that the road grade was above 10%, and Shackleford did not show it to Faulkner during the inspection. *Id*. Shackleford also noted the road had 6-foot berms, which were three times the required size. Tr. 69. However, Faulkner testified that only some of the berms measured six feet in height. Tr. 33–34.

Faulkner issued Citation No. 8409739 because Respondent "failed to follow the parameters of the Ground Control Plan," a violation of section 30 C.F.R. §77.1000. Ex. 1. He alleged that Respondent violated Items 6 and 7 of the Mine's ground control plan and that the violation was S&S. *Id*. Using his experience investigating runaway truck accidents, Faulkner found NHE moderately negligent based on the likelihood that haul truck drivers would lose control of the truck and cause an accident on the road. Tr. 37–39; Ex. 1. He testified that the dirt road was not durable enough to provide traction to trucks, which increased the likelihood that a

driver could lose control around the curve on the road. Tr. 38–39. Faulkner said this kind of accident would likely result in lost work days or restricted duty. Tr. 37, Ex. 1.

IV. PARTY ARGUMENTS

A. Secretary's Argument

The Secretary argues that the Respondent violated Section 77.1000 by failing to follow the safety provisions set out in Items 6 and 7 of the Mine's ground control plan. Secretary's Post-Hearing Brief (Sec'y Br.) at 11. The Secretary alleges that the Mine used the cited portion of the road to haul as many as 30 loads from the Creech coal seam. *Id*. at 8, 10. The Secretary contends that hauling coal on a road that is not compliant with Items 6 and 7 of the ground control plan could result in haul truck related accidents, which in turn could lead to lost workdays or injuries. *Id*. at 10.

Faulkner found that the grade of the cited portion of the road was greater than the maximum grade allowed by the ground control plan. Sec'y Br. at 8; Tr. 34–35. The Secretary argues that Shackleford's measurement of 13% grade was for the entire roadway, not only the cited portion. Sec'y Br. at 9. The Secretary alleges that the difference in measurements is due to the fact that the top portion of the entire roadway (the portion Faulkner cited) is much steeper than the bottom portion. *Id*.

Even at a road grade of 13%, the Secretary argues the road should have provided safety precautions required by Item 7. *Id*. Although NHE posted a sign warning trucks to use lower gears at the top of the cited road, Shackleford did not show it to Faulkner, and the Secretary argues that the sign did not properly warn of the steep grade. Sec'y Br. at 9-10; Tr. 71. The Secretary also argued that the road's berms were not high enough and the road did not have a runaway ramp in case a driver lost control due to the steep grade. *Id*. at 10.

B. Respondent's Argument

The Respondent argues that the citation should be vacated because it was brought under a regulatory section that does not apply to road grades. Respondent's Post Hearing Brief (Resp. Br.) at 5, 10. Respondent alleges that the Secretary does not have the authority under the Mine Act to regulate road grades and improperly does so through their refusal to acknowledge plans without road grade maximums. *Id*. at 5–6. Respondent also argues that the Court should vacate the citation because the road cited was not being used as a haul road and was under construction to meet the ground control plan's standards. *Id*. at 7. Inspector Faulkner did not see any coal trucks use the road the day he cited the Mine, and he said that the powder truck would not have merited a violation on its own. *Id*.

Alternatively, Respondent argues that if the road had been used to haul coal, there was no violation because the Mine complied with the ground control plan. Resp. Br. at 8. NHE claims that the Secretary's photograph exhibits show compliance with berm size and runaway ramp requirements, and that warning signs were present on the day of the citation and the day they

were hauling coal. *Id*. Respondent contends that Shackleford measured the road grade below 15% and that the road includes safety precautions required by the plan for roads over 10%. *Id*.

Finally, assuming the violation occurred, the Respondent argues that it was not S&S because there was no likelihood the road grade would result in injuries. Resp. Br. at 10. There had been no injuries before the construction and none since because the road was not used while under construction. *Id*. at 11. The Respondent also argues that it was not negligent because it was in the process of improving the road at the time of the citation. *Id*.

V. ANALYSIS

A. Citation No. 8409739

Inspector Faulkner alleged that Nally and Hamilton violated 30 C.F.R. § 77.1000 because it failed to maintain the haul road at 15% grade and did not provide adequate safety measures for the road, as required by its ground control plan. The provision provides in part:

> Each operator shall establish *and follow a ground control plan* for the safe control of all highwalls, pits, and spoil banks to be developed…which shall be consistent with prudent engineering design and *will insure safe working conditions*.

30 C.F.R. § 77.1000 (emphasis added).

As an initial matter, Respondent argues that MSHA overstepped its authority in issuing the citation because section 77.1000 applies only to highwalls, pits, and spoil banks, and not to road grades. Resp. Br. at 5-6. NHE therefore claims that MSHA improperly cited to section 77.1000 to require compliance "in excess of the standards required by the Act and by the applicable case law." *Id*. at 6.

I find that MSHA was within its power to regulate road grades and to issue the citation for NHE's failure to follow its ground control plan. The Commission has held that section 77.1000 requires operators of surface coal mines to establish and follow a ground control plan. *RNS Services, Inc.*, 18 FMSHRC 523, 523 n.1 (Apr. 1996); *Revelation Energy, LLC*, 36 FMSHRC 1581, 1607 (June 2014) (ALJ) ("[Section 77.1000] simply requires that an operator follow the ground control plan, and any failure to do so is a violation of the regulation"). In addition to ensuring the safe control of all highwalls, pits, and spoil banks, the ground control plan must "insure safe working conditions" at the mine. 30 C.F.R. § 77.1000. Commission judges have found this additional mandate to extend over and above the items listed in the provision. *See Central Appalachia Mining, LLC*, 29 FMSHRC 430, 437 (June 2007) (ALJ) (Holding that section 77.1000 is applicable to blasting procedures because the provision requires operators to submit a plan that will insure safe working conditions); *Power Operating Services*, 16 FMSHRC 2331, 2341 (Nov. 1994) (ALJ) (Accepting that section 77.1000 could regulate truck dump levels and ramps, but vacating the citation because the operator adequately complied with the relevant provisions of the ground control plan).

NHE does not dispute that its ground control plan expressly requires it to maintain haul roads at a prescribed maximum grade and provide adequate safety measures for roads graded above 10%. *See* Ex. 3 at 14. It is also quite clear that these haul road provisions insure safe working conditions around the Creech coal seam. The cited road is the only means of access to the Creech coal seam and thus must be used to haul coal out of the mine. *See* Tr. 27. The road's maintenance is a necessary component of its safe, efficient, and productive development, and failure to properly maintain the road in accordance with the ground control plan could result in unsafe working conditions at and near the Creech coal seam. In acknowledging the ground control plan, MSHA clearly and justifiably believed that haul road regulations were necessary to insure safe mining conditions at Day Branch. I therefore find that MSHA possessed the authority under section 77.1000 to include and enforce the haul road provisions in Respondent's ground control plan.

I also reject NHE's contention that the cited road was not a "haul road" as defined by the ground control plan. Resp. Br. at 7. NHE's ground control plan defines a "haul road" as "roads where coal or mining rock trucks normally operate." Ex. 3 at 14. Inspector Faulkner admitted at hearing that NHE was not hauling coal on the day of the inspection, and testified that he issued the citation based on his observation of the physical condition of the highwall, the presence of the powder truck at the top of the hill near the drill bench, and because Foreman Shackleford "insinuated" that NHE hauled coal along the road prior to the inspection. Sec'y Br. at 7.

Respondent is correct to point out that a powder truck does not haul coal or mining rock and therefore does not prove that the road was a haul road under the ground control plan. However, Faulkner's other observations suffice to show that the cited road qualifies as a haul road. Faulkner credibly testified that the cited road was the only access road to the Creech coal seam and that the condition of the highwall indicated that coal had been mined and removed from the area. Tr. 36, 58. Faulkner also noted that extraction from the coal seam must have been relatively recent because NHE amended its ground control plan to add the Creech coal seam a mere two months prior to the inspection. Tr. 26-27. Faulkner's inference was confirmed during the inspection when Shackleford insinuated to him that NHE previously hauled coal along the road. Tr. 24-25, 31-32. His inference was reaffirmed at hearing when Shackleford conceded that NHE used the road to haul 25 to 30 loads of coal out from the Creech coal seam a week or so prior to the issuance of the citation. Tr. 58, 65, 73. I credit Inspector Faulkner's observations and find Shackleford's admission to carry significant weight regarding NHE's use of the road. Based on these facts, I find that the road constitutes a haul road as defined by NHE's ground control plan.

Turning now to the violation itself, I find that NHE violated provision 6 of its ground control plan. Provision 6 requires the maximum grade of any haul road to be either 15% or the maximum grade recommended by the manufacturer. Ex. 3 at 14. While Faulkner did not ask for coal truck manufacturer recommendations, NHE did not provide any at that time and Shackleford testified that none were available. Tr. 35, 73. Thus, the 15% maximum grade applies to the haul road.

Inspector Faulkner measured the grade of the road from the midpoint to the Creech coal seam with an Abney level and determined that the upper portion of the road measured at a 25%

grade. Tr. 24. He used a laser rangefinder to determine that the steep grade existed for a distance of 265 feet. Tr. 29; Ex. 1. Though NHE was not hauling coal at the time of his measurement, I credit Faulkner's testimony that the slope and elevation of the mountain foreclosed any possibility that the road's grade could have changed so drastically since NHE last hauled coal over it. Tr. 55. The elevation and slope of the mountain, as well as the manner in which the roadway was cut into the terrain of the mountain, suggested that the grade could not have been altered to such an extreme degree by the work that NHE was doing. Tr. 27.

NHE argues that Shackleford measured the road at a grade of 13%, well within the requirements of Provision 6. Resp. Br. at 9; Tr. 43, 65. Shackleford attributed Faulkner's 25% measurement to a large, temporary hump that NHE created while working on the road near the Creech coal seam. Tr. 65. He told Faulkner that NHE was widening the road and reducing the grade by pushing out material. Tr. 43–44, 66–68. He also noted that NHE did not haul over the hump because it would have been too steep. Tr. 43, 65.

I find Shackleford's testimony on this subject to be inconsistent and do not credit this measurement. Shackleford did not specify when he took the measurement, and testified that his 13% grade measurement considered the entire roadway rather than the cited 265-foot segment. *See* Tr. 70-71. It is undisputed that the upper segment of the road was significantly steeper than the lower portion, and therefore Shackleford's measurement of the entire road did not accurately reflect the grade of the cited 265-foot segment. Tr. 47-48. He conceded at hearing that the grade of the cited segment of road at the time that coal was being hauled was the same as it was in Faulkner's photographs, which highlighted only a small portion of the road. Tr. 75-77; Ex. 4. Thus, I conclude that Shackleford's 13% measurement was due at least in part to the inclusion of the portions of the road that were in compliance with the ground control plan and not at issue in this case.

Furthermore, Shackleford's claim that the hump significantly altered the road grade demonstrates that he misunderstood which segment of the road was cited. Faulkner explicitly testified that the violative segment of road was located well below the hump where NHE was performing construction. *See* Tr. 47-48, 53-54. At hearing, Faulkner drew a picture of the road clearly indicating that the cited segment was some distance from the hump, which was located at the Creech Coal seam elevation. Tr. 53; Ex. 5. His photographs of the cited area show no evidence that NHE was working on or near the cited area, as neither the hump nor any construction equipment are visible in the photographs. Ex. 4.

Even if Faulkner included the hump in his measurement, Shackleford failed to explain why NHE needed to perform maintenance work on the road if the road grade measured 13%, a permissible grade under the ground control plan. Additionally, Shackleford failed to address how pushing out material would somehow nearly double the road's grade in order to account for Faulkner's measurement. As noted above, I find that Respondent's construction work, as described by Shackleford, cannot account for the stark increase in grade along the road. Shackleford acknowledged as much when he testified that the work being done at the hump was aesthetic and would not change the grade of the road. Tr. 77. Faulkner provided similar testimony; while he was unsure exactly what the dozers were doing, they were pushing material straight out on a level area and would not affect the grade of the cited segment of road. Tr. 48,

53; Ex. 4. Based on this testimony, it is clear that NHE's construction did not significantly alter or affect Faulkner's measurement of the road grade.

Accordingly, I find that the Secretary established that NHE failed to follow provision 6 of its ground control plan, in violation of section 77.1000.

The Secretary next alleges that Respondent violated provision 7 of its ground control plan because it did not provide additional safety measures for the road. Sec'y Br. at 9. Provision 7 states that "[h]aul roads with grades exceeding 10% shall be provided with additional safety measures such as steep grade warning signs, reduced speed limits, larger berms, straddle berms, runaway ramps etc." Ex. 3 at 14. Since the measurements of Shackleford and Faulkner both indicated that the road's grade exceeded 10%, the issue is whether Respondent provided additional safety measures.

NHE argues that it provided oversized berms, a straddle berm, a runaway ramp, and a sign at the top of the road urging truck operators to use lower gears. Resp. Br. at 8-9. NHE conceded that it did not bring up the straddle berm and runaway ramp at hearing, and I find that neither is clearly visible in the photographic evidence. *See id*. I do not credit the presence of the straddle berm and runaway ramp, but nonetheless find that NHE provided adequate safety measures along the road in compliance with provision 7.

The photographic evidence indicates that NHE built berms exceeding the minimum height along the cited road segment. Ex. 4. The berms are visible in all of Inspector Faulkner's photographs and clearly exceed the required minimum, in some areas by multiple feet. *See id*. Shackleford testified that NHE also placed a sign near the top of the road that cautioned drivers to use lower gears. Tr. 71. Though Shackleford did not show Faulkner the sign at the time of the inspection, the Secretary did not dispute its existence, and I credit Shackleford's testimony as such. *Id*.

I reject the Secretary's contention that the sign was inadequate because it did not explicitly warn trucks of the steep grade or to reduce speed along the road. Sec'y Br. at 10. A warning suggesting that trucks use lower gears signals the driver to proceed slowly and with caution. Use of lower gears also suggests that a change in grade may occur. I find that the berms were adequate and the sign appropriately warned operators that the upcoming stretch of road was steep and that lower speeds were recommended. Tr. 71. Accordingly, NHE did not violate provision 7 of its ground control plan.

In sum, NHE violated provision 6 of its ground control plan when it failed to properly maintain the haul road at or below the 15% maximum grade. However, NHE provided adequate safety measures around the road in compliance with provision 7. The citation is **AFFIRMED**.

B. Significant & Substantial

A violation is significant and substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will

result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id*. at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

I have already found that Nally & Hamilton violated section 77.1000, a mandatory standard, when it failed to adhere to its ground control plan and maintain the haul road at a 15% maximum grade. The discrete safety hazard posed by the violation is that the steep grade may cause a coal truck driver to lose control of the vehicle and collide with a berm or overturn the vehicle. Given the particular facts surrounding the violation, it is highly likely that the hazard would occur. The road was 10% steeper than permitted and was the only means of access to the Creech coal seam and drill bench. Tr. 27. The Mine used the road to haul coal from the highwall. Tr. 73. Inspector Faulkner testified that the roadway was made out of fresh earthen dirt and not durable stone, which reduced traction and could affect a haul truck operator's ability to brake or maintain control of the vehicle. Tr. 38-39. The road also had a relatively sharp curve, and losing control of a haul truck while driving along it could exacerbate the likelihood of injury. Tr. 37; Ex. 4. It is therefore likely that trucks would lose control or crash while hauling coal on a road with a grade of 25%.

Since the road grade was 10% higher than the prescribed maximum, it is reasonably likely that a truck operator would lose control and crash, collide, or overturn the vehicle, resulting in ejections or other serious collision-related injuries. I credit Inspector Faulkner's testimony that in his experience, injuries caused by runaway trucks in surface operations are reasonably likely to be serious. Tr. 37-38. I therefore find that the violation was S&S.

C. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d).

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

I find that NHE's negligence is low. NHE should have known that the grade of the road was 10% higher than its ground control plan permitted, but it provided safety measures to mitigate the risk of an accident and therefore did not violate provision 7 as alleged by the Secretary. The testimony and photographic evidence prove that Respondent built large berms along the road and provided a sign urging operators to use lower gears. *See* Tr. 38-39; Ex. 4. These safety measures were adequate under Respondent's ground control plan and resulted in the vacatur of one portion of the citation, and also mitigated the potential risk of operating on the road. I also credit Shackleford's testimony that he measured the grade of the road at some point before the inspection took place. Tr. 43, 65. Although, as discussed above, Shackleford's measurement did not accurately portray the grade of the cited road segment, he nonetheless made a good faith attempt to comply with the ground control plan. I therefore reduce NHE's negligence from moderate to low.

VI. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(I).

The Secretary proposed a regularly assessed penalty of $634.00. Nally and Hamilton have no history of violating section 77.1000 in the past two years. The parties stipulated that the Day Branch Mine produced 310,980 tons of coal and employed between 33 to 35 miners working 99,823 hours in 2016. Jt. Stip. 3. NHE therefore qualifies as a medium to large sized operator. *See* 30 C.F.R. § 100.3. The parties also stipulated that the civil money penalty as assessed will not affect NHE's ability to remain in business. Jt. Stip. 4.

I discussed my gravity and negligence findings in greater detail above. NHE violated the standard, and the violation was S&S and highly likely to result in lost workdays or restricted duty. I reduced NHE's negligence from moderate to low because while NHE should have known

that the road grade violated provision 6 of its ground control plan, NHE provided adequate safety measures along the road and did not violate provision 7 as alleged by the Secretary. NHE acted in good faith to achieve compliance the same day it received the citation. After considering the statutory criteria, I assess a penalty of $500.00.

VII. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$500.00** within 30 days of this order.[2]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Mary Sue Taylor, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

S. Thomas Hamilton, Nally & Hamilton Enterprises, Inc., 212 East Stephen Foster Avenue, P.O. Box 327, Bardstown, Kentucky 40004

[2] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

June 5, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BIG RIDGE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-57 A.C. No. 11-03054-163984 Mine: Willow Lake Portal

DECISION ON REMAND AND ORDER TO PAY

Before: Judge Feldman

This remand matter concerns a Decision by Judge Melick vacating Citation No. 6674618 in Docket No. LAKE 2009-57. 33 FMSHC 2238, 2250 (Sept. 2011) (ALJ). Judge Melick has since retired. Judge Melick concluded that the underlying safeguard at issue in Citation No. 6674618 was invalid because it failed to provide the mine operator with adequate notice of the hazard addressed by the safeguard concerning the transportation of men and/or materials. *Id.*

On appeal, the Commission reinstated the subject safeguard, holding that it provided the mine operator with adequate notice of the condition covered and the conduct required to satisfy the underlying notice of safeguard. 37 FMSHRC 213, 216 (Feb. 2015). Consequently, the Commission remanded this matter for assessment of the appropriate civil penalty.[1] *Id.* at 217. Action on the Commission's remand was delayed due to administrative error. This matter was assigned to me on May 2, 2017, for disposition of the Commission's remand.

[1] The caption in the Commission's remand also concerned Docket Nos. LAKE 2008-436, LAKE 2009-58, LAKE 2009-59, and LAKE 2009-378. With the exception of Citation No. 6674618 in Docket No. LAKE 2009-57, for which the parties have not agreed upon payment of a $1,795.00 civil penalty, Judge Melick ordered that Big Ridge pay a total civil penalty of $272,961.00 in satisfaction of the all other citations/orders in these five dockets. Big Ridge has timely paid the $272,961.00 civil penalty.

On May 22, 2017, the parties filed a Motion to Approve Penalty that reflects that Big Ridge has agreed to withdraw its contest of Citation No. 6674618, and pay the Secretary's proposed penalty of $1,795.00 in full. Having considered the representations and documentation submitted in this matter, I conclude that the proffered motion to order payment is appropriate under the criteria set forth in section 110(i) of the Mine Act.

ORDER

Accordingly, **IT IS ORDERED** that Big Ridge, Inc. pay the proposed $1,795.00 civil penalty within 40 days of the date of this Order in satisfaction of the safeguard at issue in Citation No. 6674618.[2] Upon receipt of timely payment, the captioned civil penalty proceeding in Docket No. LAKE 2009-57 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/acp

[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

June 8, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2015-596 A.C. No. 33-04502-385170
v.	Docket No. LAKE 2015-639 A.C. No. 33-04502-387619
THOMPSON ELECTRIC, INC., Respondent	Mine: Sober Sand & Gravel

SUMMARY DECISION

Appearances: Lisa A. Cottle, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio, on behalf of the Petitioner;
Keith L. Pryatel, Esq., Kastner Westman & Wilkins, LLC, Akron, Ohio, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalties filed by the Secretary of Labor ("Secretary") under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act" or "Act"), 30 U.S.C. § 815(d), against the Respondent, Thompson Electric, Inc. ("Thompson Electric"). Thompson Electric is an independent contractor that performed electrical services at the Sober Sand & Gravel mine ("Sober Mine") in Portage County, Ohio. The Sober Mine, which is owned and operated by Ray Bertolini Trucking Co., is a facility where a dredge is used to excavate submerged sand and gravel. The services performed by Thompson Electric consisted of disconnecting and reconnecting electrical power to a dredge to allow for the movement of the dredge on mine property.

During the course of an April 29, 2015, Mine Safety and Health Administration ("MSHA") inspection of the Sober Mine facility, Thompson Electric was cited for three violations of the Secretary's mandatory safety standards: Citation No. 8842392, which alleges that a Thompson Electric employee failed to use adequate fall protection; Citation No. 8842396, which alleges a failure to develop and implement a written plan for new miner training; and Order No. 8842394, which alleges a failure to provide new miner training.

Thompson Electric does not dispute the facts that the Secretary relies on to support the alleged violations. *See Jt. Stip.*, at 1-4 (Feb. 10, 2017). However, on March 29, 2017, Thompson Electric filed a Motion for Summary Decision seeking that the violations be vacated based on a

lack of Mine Act jurisdiction. *See Resp. Br.*, at 1-2 (Mar. 29, 2017). While the Secretary does not object to resolving this matter summarily, the Secretary opposes Thompson Electric's denial of jurisdiction. *See Sec'y Br.*, at 7 (Apr. 19, 2017). As both parties agree that a summary decision is appropriate in resolving the issue of Mine Act jurisdiction, I construe the parties' pleadings as cross-motions for summary decision.

In furtherance of resolving this matter via summary decision, the parties have filed joint stipulations of material facts. The parties' Joint Stipulations provide:

1. The Sober Mine is a surface "mine" as that term is defined in section 3(h) of the Mine Act. The Sober Mine is owned and operated by Ray Bertolini Trucking Co. Joseph F. Bertolini is the President of the Sober Mine and Eric Gross is a Foreman of the Sober Mine.

2. At all material times involved in this case, the commodities of the Sober Mine (construction sand and gravel) entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act.

3. Respondent Thompson Electric is an independent contractor that performed electrical services on a dredge at the Sober Mine in Portage County, Ohio.

4. Thompson Electric is not an "owner" or "lessee" of the Sober Mine within the meaning of 30 U.S.C. § 802(d), nor does Thompson Electric "control" or "supervise" the Sober Mine within the meaning of 30 U.S.C. § 802(d).

5. The only equipment that Thompson Electric's employees worked on or performed services on at the Sober Mine was a single dredge owned by the Sober Mine. The dredge is used to excavate submerged sand and gravel from the mine.

6. The scope of Thompson Electric's work at the mine was to disconnect the electrical power to the dredge where it was originally located on the mine property, and then later once the dredge was relocated by the Sober Mine, re-connect electrical power to the dredge.

7. The new location of the dredge was approximately 1,500 feet from its original location and 2,500 feet from the entrance to the Sober Mine. At the new location, the dredge was scheduled to be re-connected to an electrical sectioning cabinet.

8. At the time of the alleged MSHA citations at issue . . . the dredge had already been moved to its new location by the Sober Mine.

9. Thompson Electric employees were at the Sober Mine property a total of six (6) days.

10. On the first day (12/24/14), a single Thompson Electric employee disconnected the dredge power source. That Thompson Electric employee was present for seven (7) hours at the Sober Mine property. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

11. On the second and third days (4/22/15 and 4/23/15), two employees of Thompson Electric worked on electrical connect components of the dredge at its new location. Both Thompson Electric employees worked seven (7) hour days. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

12. On April 24 and 27, 2015, four (4) Thompson Electric employees worked on the electrical connect components of the dredge at its new location for seven (7) hours each day. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

13. April 24, 2015, was the first day that the worker (Pete Aglioti) who committed the fall protection infraction at issue in Citation No. 8842392 was at the Sober Mine site during the six (6) day period at issue in the citations.

14. On April 29, 2015, two Thompson Electric employees arrived to work at the Sober Mine. However, the Sober Mine had not moved the power cable to the new location. Therefore, two additional Thompson Electric employees were sent to the Sober Mine to also work on the dredge at its new location.

15. On April 29, 2015, MSHA issued Thompson Electric Citation No. 8842392 because Thompson Electric employee Pete Aglioti failed to utilize fall protection. At the time, Joe Bertolini of the Sober Mine was handing a power cable for the dredge to Pete Aglioti who was on the dredge, approximately 13 feet above ground level, without wearing fall protection. Pete Aglioti had been trained by Thompson Electric about the need to wear fall protection whenever working from a surface four or more feet above ground level. Thompson Electric immediately (i.e. on 4/29/15) sent Pete Aglioti home for disciplinary reasons, and ultimately issued him a 3-day suspension for failing to wear fall protection as he had been trained.

16. On April 29, 2015, the dredge was locked-out from its power source and the Sober Mine was operating.

17. On April 29, 2015, MSHA issued Thompson Electric Order No. 8842394 for failing to provide four employees with newly hired inexperienced miner training pursuant to 30 C.F.R. § 46.5(a). Thompson Electric admits that it did not provide newly hired inexperienced miner training to the four employees.

18. On April 30, 2015, MSHA issued Thompson Electric Citation No. 8842396 for failure to develop or implement a Part 46 Training Plan. Thompson Electric

admits that it did not develop or implement a Part 46 Training Plan. On April 30, 2015, the dredge was locked-out from its power source and the Sober Mine was operating.

19. Thompson Electric did not complete its work at the Sober Mine. Once the MSHA officer, on April 29, 2015, informed Thompson Electric of its intention to cite the Respondent for MSHA violations, Respondent promptly exited the Sober Mine location and did not return.

20. Thompson Electric timely contested all of the issued MSHA citations.

Jt. Stip., at 1-4.

Thompson Electric seeks to have the subject citations and order vacated on jurisdictional grounds. As noted, Thompson Electric has stipulated to the facts surrounding the issuance of the citations and order. If Mine Act jurisdiction is found, the parties have proffered conditional settlement terms with respect to the issues of significant and substantial (S&S) and degree of negligence, and the proposed civil penalty for each of the three cited conditions. However, the parties reserve the right to appeal any adverse finding as a consequence of this Summary Decision.

Thus, there are two threshold issues to be resolved in this Summary Decision: 1) whether Thompson Electric is subject to Mine Act jurisdiction; and 2) whether Thompson Electric is subject to Part 46 training requirements. As discussed below, although I have found that Thompson Electric is subject to Mine Act jurisdiction, the Part 46 training violations shall be vacated. Consequently, the parties' motions for summary decision shall each be granted in part, in that the Secretary has prevailed on the issue of Mine Act jurisdiction, and Thompson Electric has prevailed with respect to the inapplicability of Part 46.

I. Mine Act Jurisdiction

a. Thompson Electric's Jurisdictional Challenge

Thompson Electric argues that it should not be subject to Mine Act jurisdiction because it was not "engaged in the extraction process" and because its activities were *de minimis* in that they were limited solely to electrical maintenance on a dredge. *Resp. Br.*, at 10. In this regard, Thompson Electric asserts that it was never present at the Sober Mine for more than five consecutive work days, and that at all times its employees were performing electrical maintenance on a dredge that was "locked out from its power source," was "completely inoperable," and "was not excavating any aggregates." *Id.* at 5-6; *Jt. Stip*., at ¶ 9-14. Finally, Thompson Electric reportedly left the Sober Mine location immediately after being cited for the alleged violations and has no intention of returning. *Id.* at 7; *Jt. Stip*., at ¶ 19.

In support of its motion, Thompson Electric relies on the Fourth Circuit decision in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), wherein the court concluded that a power company that installed, maintained, and took monthly electric meter readings at a

substation that was separated from the rest of mine property by a chain link fence was not "an operator" within the meaning of section 3(d) of the Mine Act, which includes contractors performing services at a mine. Thompson Electric further relies on *N. Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848 (7th Cir. 2002) (citations omitted), in which the court stated "there may be a point … at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." In *N. Illinois Steel*, the Seventh Circuit held that a company whose employees drove delivery trucks onto mine property and helped unload those vehicles was not subject to Mine Act jurisdiction. *Id.* at 848-49.

Finally, Thompson Electric heavily relies on the recent Sixth Circuit holding in *Maxxim Rebuild Co. v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), which held that a contractor that repairs mining equipment in a repair shop at an off-site location is not subject to Mine Act jurisdiction. The distance of the repair shop from a mine site was not specified by the Sixth Circuit in *Maxxim Rebuild* as the repair shop serviced the equipment for a number of different mines. *Id.* at 737.

The Secretary argues that the electrical contract services provided by Thompson Electric on the dredge located on Sober Mine property were essential to the sand dredging process and, thus, are subject to Mine Act jurisdiction, despite the fact that the electrical work was performed for only six non-consecutive days. *Sec'y Br.*, at 4-5.

b. Statutory Provisions

The jurisdictional question must be resolved based on application of the statutory definitions of "a mine" and "a mine operator." Section 3(h)(1) provides, in relevant part, that a mine is "an area of land from which minerals are extracted … [and] private ways … appurtenant to such area." 30 U.S.C. § 802(h)(1). Included within the statutory definition of a mine is "equipment [and] machines … used in, or to be used in … the work of extracting such minerals from their natural deposits…." *Id.* As noted above, the Mine Act's definition of a mine operator includes "any independent contractor performing services … at [a] mine." 30 U.S.C. § 802(d).

c. *Otis Elevator* Test

In its *Otis Elevator* cases, the Commission established a two-pronged test for determining whether an independent contractor shall be considered an "operator" under section 3(d). 11 FMSHRC 1896 (Oct. 1989) ("*Otis I*") and 11 FMSHRC 1918 (Oct. 1989) ("*Otis II*"), *aff'd on other grounds*, 921 F.2d 1285 (D.C. Cir. 1990). The first inquiry is the degree of "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process. *Otis I,* 11 FMSHRC at 1902. The Commission has determined a contractor's activities are sufficiently related to the extraction process when its employees are exposed to mining hazards and they have "a direct effect on the safety of others…." *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Id.* The Commission has articulated that the essence of this test is whether the contractor's "contacts with the … mine were not so rare, infrequent and attenuated as to bring [the] case within the holding of *Old Dominion*…." *Otis II,* 11 FMSHRC at 1922-23; *see also Joy*

Technologies Inc., 99 F.3d 991, 999 (10th Cir. 1996) (expressly rejecting the *Old Dominion* approach and adopting the broad jurisdictional reach in *Otis Elevator*); *see also Bulk Transp. Services Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991) (broadly construing section 3(d) in finding that a coal haulage company was a statutory operator that performed an essential service on mine property).

In applying the *Otis Elevator* criteria, we first look to the independent contractor's proximity and relationship to the extraction process. Thompson Electric's reliance on *Old Dominion* and *Maxxim Rebuild* to support its apparent assertion that it was insufficiently connected to the mining process is misplaced. Unlike this case, both *Old Dominion* and *Maxxim Rebuild* concerned activities that either were performed in an area fenced off from the active mine, or not performed on mine property. As noted, *Old Dominion* concerned off-site meter readings at a substation separated from the rest of mine property by a chain link fence. 772 F.2d at 93. *Maxxim Rebuild* concerned "repairs [of] mining equipment at a site that is neither adjacent to nor part of a working mine." 848 F.3d at 737. In finding a lack of Mine Act jurisdiction, the court in *Maxxim Rebuild* focused on the statutory definition of a "coal or other mine," which, as previously noted, includes "facilities" and "equipment … used in, or to be used in … the work of preparing coal or other minerals." *Id.* at 740 (citing 30 U.S.C. § 802(h)(1)). In considering the Mine Act's statutory definitions, the court stated:

> … [C]ontext and perspective are everything. In pulling back the lens, we see several indications that the power of the Mine Safety and Health Administration extends only to such facilities and equipment if they are in or adjacent to — in essence part of — a working mine.
>
> Start with what § 802(h)(1) defines: a "coal or other mine." The term is locational. And the location concerns mines. Equipment by itself tells us nothing about where it is. And a facility by itself does not say anything about whether it is connected to a mine. As the title of the Act (the Federal *Mine* Safety and Health Act) and the title of the pertinent agency (the *Mine* Safety and Health Administration) suggest, the definition of "coal or other mine" relates to a place — land and things in or connected to a mine.

Id. (emphasis original). It is significant that, in finding an absence of jurisdiction, the Sixth Circuit "pulled back the lens" to focus on the off-site location of the subject repairs — a focus that Thompson Electric seeks to ignore. Thus, similar to the physically isolated location of the substation in *Old Dominion*, it was the off-site location of the repairs that served as the basis for the Sixth Circuit's finding of an absence of Mine Act jurisdiction.

With regard to the question of the relationship of the electrical services performed by Thompson Electric to the extraction process, Thompson Electric relies on the Seventh Circuit's holding in *N. Illinois Steel*, which exempted contractors delivering steel on mine property from Mine Act jurisdiction. 294 F.3d at 844. The Seventh Circuit held that the independent

contractor's delivery services were "so attenuated [from the mining process] as to remove it from the jurisdiction of MSHA." *Id.* at 848. In this regard, the court stated:

> … [T]he work performed by the NIS drivers at the mine can only be described as *de minimis.* In fact, there is nothing to distinguish NIS's deliveries of steel from deliveries by other vendors or parcel delivery companies of supplies to be used by the miners.

Id. at 849.

In *Otis II*, the D.C. Circuit found Mine Act jurisdiction over a contractor who had conceded that it had performed "limited but necessary" service at mines. 921 F.2d at 1290 n.3. So too, this case concerns the maintenance of heavy mining equipment, specifically a dredge, which is indispensable to the sand and gravel dredging process. The delivery and offloading of steel on mine property in *N. Illinois Steel* clearly is distinguishable from the maintenance of mine equipment *on mine property* — activities that are explicitly regulated by Part 56 of the Secretary's mandatory safety standards governing metal and nonmetal surface mines. *See* 30 C.F.R. Part 56.

In this regard, section 56.14105 specifically requires that repairs and maintenance of electrical equipment may only be performed when power is off and the equipment is blocked. 30 C.F.R. § 56.14105. To exempt on-site contract employees performing maintenance services on mine equipment from the protective provisions of section 56.14105 makes no sense. Thompson Electric's apparent assertion that maintenance on locked-out de-energized equipment is exempt from Mine Act jurisdiction due to its inoperable status is a distinction without a difference that must be rejected. Thus, de-energizing equipment prior to maintenance is a requirement of the safety standards, rather than a basis for an exemption from them.

The remaining criterion of the *Otis Elevator* test concerns the extent of the contractor's presence at the mine. Thompson Electric asserts that its six-day presence at the Sober Mine was sufficiently infrequent and *de minimis* to exempt it from Mine Act jurisdiction. *Resp. Br.*, at 4-13. Moreover, Thompson Electric reportedly has no intention of performing further services at the Sober Mine site. *Resp. Br.*, at 7; *Jt. Stip.*, at ¶ 19.

Resolving jurisdiction based on the degree of a contractor's presence at a mine site must be based on an analysis of the facts as they existed at the time of the issuance of the citations, rather than a speculative and self-serving estimation by the contractor regarding the extent of its future activities, or absence thereof, at a mine site. In other words, Thompson Electric cannot achieve a self-imposed exemption from the Act's jurisdiction by simply asserting that it will not return to the Sober Mine. Therefore, Thompson Electric's presence at the Sober Mine for only six days is not dispositive of the jurisdictional question.

Both parties agree that summary decision based on their joint stipulations is the preferable vehicle for resolving the jurisdictional issue. *See Sec'y Br.*, at 7-8; *Resp. Br.*, at 22. Commission Rule 67(b) provides that a motion for summary decision shall be granted if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Hanson Aggregates New York, Inc.*, 29

FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion for summary decision should be granted, the court must construe the undisputed material facts in a light most favorable to the opposing party.[1] *Hanson*, 29 FMSRHC at 9.

Construing the evidence in a light most favorable to Thompson Electric, there are no outstanding issues of material fact to conclude that the services performed by Thompson Electric were so attenuated from the dredging process to warrant an exemption from Mine Act jurisdiction. Rather, Thompson Electric's performance of maintenance services on mining equipment on mine property falls squarely within the statutory reach of the Mine Act. Consequently, as an "independent contractor performing services" at a mine, Thompson Electric must be considered a statutory "operator" that **is subject to the Act's jurisdiction**. *See* 30 U.S.C. § 802(d).

II. Part 46 Training Requirements

As a consequence of MSHA's April 29, 2015, Sober Mine inspection, Thompson Electric received two citations alleging violations of Part 46: Citation No. 8842396, which alleges a failure to develop and implement a written plan for new miner training in violation of 30 C.F.R. § 46.3(a)[2]; and 104(g)(1) withdrawal Order No. 8842394, which alleges a failure to provide new miner training in violation of 30 C.F.R. § 46.5(a)[3,4].

In addressing the validity of the alleged violations of Part 46, it is necessary to differentiate the statutory term "miner" in section 3(g) of the Mine Act from the regulatory term "miner" in 30 C.F.R. § 46.2(g). Section 3(g) of the Act broadly defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

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[1] Thompson Electric is, in essence, the opposing party to the Secretary's cross-motion for summary decision on this jurisdictional question.

[2] Section 46.3(a) provides:

> [Operators] must develop and implement a written plan, approved by [MSHA] under either paragraph (b) or (c) of this section, that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training.

[3] Section 46.5(a) provides, in pertinent part:

> … [Operators] must provide each new miner with no less than 24 hours of training…. Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

[4] Section 104(g)(1) of the Mine Act requires the withdrawal from the mine of miners who have not received the requisite safety training. 30 U.S.C. § 814(g)(1).

On the other hand, Part 46 defines a "miner" as follows:

> (1) *Miner* means: (i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations and (ii) Any construction worker who is exposed to hazards of mining operations.

30 C.F.R. § 46.2(g). However, not every contractor performing services at a mine is subject to Part 46. In this regard, section 46.2(g)(2) provides:

> The definition of "miner" [in Part 46] does not include … maintenance or service workers who do not work at a mine site for frequent or extended periods.

30 C.F.R. § 46.2(g)(2).

Thus, the Secretary acknowledges, given the section 46.2(g)(2) exemptions, that a statutory "miner" under section 3(g) of the Mine Act may not be considered a *per se* "miner" for the purposes of Part 46. Rather, it is the frequency and extent of a contract employee's presence at a mine that determines whether the contract employee is subject to the training requirements of Part 46.

The parties have stipulated that Thompson Electric's employees were present at the Sober Mine to perform electrical maintenance on a dredge for a total of six days: one day in December 2014 and five work days in April 2015. *Jt. Stip.*, at ¶ 9-14. The Secretary does not dispute that Thompson Electric's services were limited in scope, in that they only required disconnecting and re-connecting power to a dredge to allow for its repositioning. *Id.* at ¶ 6. Consequently, Thompson Electric argues that its employees' infrequent and limited presence at the mine exempts it from Part 46 training requirements. *Resp. Br.*, at 16-20.

Conversely, the Secretary argues that Thompson Electric's employees spent significant time at the mine performing work on a dredge that was integral to the extraction process. *Sec'y Supp. Br.*, at 2 (May 24, 2017). Moreover, the Secretary notes that, had MSHA's intervention not triggered a work stoppage, Thompson Electric would have maintained a continuing presence at the mine for additional time. *Id.*

In considering the proper interpretation of the "miner" exemption in section 46.2(g)(2), it is axiomatic that, to the extent that a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). Under this doctrine, the promulgating agency's interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered judgment on the matter. *Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citations omitted).

Here, the Secretary's application of the operative phrase "for frequent or extended periods" must be consistent with its plain meaning. Determining the appropriateness of the Secretary's application of the Part 46 "miner" exemption requires a qualitative and quantitative analysis. Qualitatively, although the services provided by Thompson Electric were essential, they were very limited in scope. Quantitatively, the services only required the presence of its employees for a short period of time. To permit such a limited presence at a mine site to overcome the exemption in section 46.2(g)(2) would render the exemption meaningless. Here, the record reflects that Thompson Electric's employees were present at the mine for a total of six days. On balance, I do not view as persuasive the Secretary's argument that a six day presence (one day in December 2014 and five work days in April 2015) is sufficient to overcome the explicit exemption promulgated by the Secretary in section 46.2(g)(2), given the limited scope of the services rendered.

In apparent recognition that the five days spent on reconnecting the dredge may not have been sufficient to trigger the Part 46 training requirements, the Secretary asserts that Thompson Electric's presence at the mine would have been greater had it not abruptly left the mine after being informed of MSHA's jurisdiction.[5] *Sec'y Supp. Br.*, at 2. However, given the parties' stipulations, even if finishing the limited task of reconnecting the dredge's power supply required Thompson Electric's additional presence for a short period of time, the limited scope of the services performed would still exempt Thompson Electric from the Part 46 training requirements.

I note that although Thompson Electric has been relieved of its obligation to satisfy Part 46 training requirements, it is still subject to the Secretary's mandatory safety and health standards.[6] In fact, Thompson Electric requires its employees to tie down when there is a danger of falling. *See Jt. Stip.*, at ¶ 15. Nevertheless, the Secretary is seeking to impose the burden of formulation of a Part 46 training plan on a contractor that has a very limited presence at a mine, despite the Secretary's own promulgation of the exception in section 46.2(g)(2).

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[5] The Secretary refers to MSHA's Program Policy Manual, which states that the term "extended" presence in section 46.2(g)(2) means more than five consecutive work days. *Resp. Br.*, at 18 (citing MSHA Program Policy Manual Vol. III, Part 46 at p. 9 (May 16, 1996)). Although the stipulations reflect that Thompson Electric was not present at the mine for five consecutive work days (it was absent on April 28, 2015), nevertheless, as the Secretary is aware, the Commission is not bound by pronouncements contained in MSHA's policy statements. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (1980).

[6] While I have found that the employees of Thompson Electric are not "miners" as contemplated by the definition in section 46.2(g), the provisions of 30 C.F.R. § 46.11 nevertheless require that its employees must be provided site-specific hazard awareness training. Section 46.11 has not been cited by the Secretary in this matter.

In view of the above, the record stipulations reflect that Thompson Electric is exempt from the training requirements of Part 46 as its presence at the Sober Mine was sufficiently limited in scope and frequency. Accordingly, Citation No. 8842396 and Order No. 8842394 **shall be vacated**.

III. Fall Protection Citation

On April 29, 2015, an MSHA inspector observed a Thompson Electric employee failing to utilize fall protection when he was reaching for a power cable while standing on a dredge while located approximately 13 feet above the ground. As a consequence, the MSHA inspector issued Citation No. 8842392 alleging a violation 30 C.F.R. § 56.15005, which requires that safety belts be worn when there is a danger of falling.

Thompson Electric has stipulated to the fact of the violation of Citation No. 8842392. *Jt. Stip.*, at ¶ 15. However, the parties' proffered settlement terms regarding Citation No. 8842392 reduce the degree of negligence attributable to Thompson Electric from "moderate" to "low," with a corresponding proposed penalty reduction from $540.00 to $250.00. The parties' settlement terms seek to maintain the S&S designation. The reduction in negligence and civil penalty is supported by the parties' stipulation that the employee who committed the violation was suspended immediately by Thompson Electric as he had been trained to wear fall protection. *Jt. Stip.*, at ¶ 15.

The mitigating circumstances noted above support the parties' proposed reduction in negligence and civil penalty. Having determined that Thompson Electric is subject to Mine Act jurisdiction, I conclude that the proffered settlement is appropriate under the statutory penalty criteria set forth in section 110(i) of the Mine Act.[7] Consequently, the parties' settlement terms regarding Citation No. 8842392 **shall be approved**. As previously noted, the parties' settlement terms are contingent on final disposition of these matters. Thus, the parties' have reserved their right to appeal the jurisdictional question, as well as any adverse finding regarding Part 46 applicability.

[7] 30 U.S.C. § 820(i) provides:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

ORDER

In view of the above, Thompson Electric, Inc., as an independent contractor performing services at a mine, is a statutory "operator" as contemplated by section 3(d) of the Mine Act. Accordingly, **IT IS ORDERED**, consistent with the parties' settlement terms, that Thompson Electric, Inc. **PAY**, within 40 days of this Order, a $250.00 civil penalty in satisfaction of Citation No. 8842392.[8]

IT IS FURTHER ORDERED that Citation No. 8842396 and 104(g)(1) withdrawal Order No. 8842394, which concern the training provisions of Part 46, **ARE VACATED**.

IT IS FURTHER ORDERED that upon timely receipt of the $250.00 civil penalty, the captioned matters **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/acp

[8] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BUNDY AUGER MINING, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-1036 A.C. No. 46-09415-391343 Mine: Lost Flats Highwall Miner

DECISION APPROVING AMENDED SETTLEMENT MOTION

Before: Judge Moran

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") and is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On May 25, 2017, the Court issued its Decision Denying Settlement Motion and following that, the case was set for a hearing scheduled to commence on August 29, 2017. On June 1, 2017, the Secretary filed a Motion for Reconsideration.[1] That Motion for Reconsideration included an Amended Motion for Decision and Order Approving Settlement, which contained significant additional information in support of the proposed settlement and, as a consequence, the Court is now able to approve the settlement.[2] Motion for Reconsideration at 16-22. However, while the settlement can now be approved, the Motion continues to include disconcerting assertions which are antithetical to the Commission's Congressionally delegated statutory obligation under 30 U.S.C. § 820(k) and which require additional comment from the Court.

Background

In the Court's May 25, 2017 Decision Denying Settlement Motion, it was noted that "2 (two) specially assessed alleged violations of the Mine Act [were in issue]. One is a section 104(d)(1) citation, No. 9082933, and the other is a section 104(d)(1) order, No. 9082935. While the proposed penalty amounts differ, $2,900 in the case of No. 9082933, with a settlement figure of $2,030, and $3,400 in the case of 9082935, with a settlement figure of $2,380, both reductions

[1] As distinct from the e-CMS filing date, the Motion for Reconsideration and the accompanying Amended Motion for Decision and Order Approving Settlement are dated May 31, 2017.

[2] Because this decision approves the Amended Motion, **the previously scheduled hearing is now CANCELLED.**

amount to the ubiquitous 30% penalty reduction that has appeared in other cases."[3] Decision Denying Settlement at 1.

The section 104(d)(1) citation, No. 9082933, involved 30 C.F.R. § 77.1004(b), titled "Ground control; inspection and maintenance; general," which provides at subsection (b) that "Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted." 30 C.F.R. § 77.1104(b). The Court noted that "[t]he entire text of the 57 words offered as 'justification' for the 30% reduction regarding the (d)(1) Citation, No. 9082933 state[d], 'Respondent presented evidence that it relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan. In consideration of this evidence and the risks inherent in proceeding to trial, the Secretary agreed to the reduction in penalty.'" Motion at 3.

However, once boilerplate language was removed, the essence of the justification offered was that the Respondent relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan. *Id*. The Court then explained that the Motion was insufficient because the standard does not speak at all in such terms. Rather,

> [i]t deals only with unsafe ground conditions, requiring that they "shall be corrected promptly, or the area shall be posted." 30 C.F.R. § 77.1004(b). The standard makes no mention of ground control plans [and it] offers nothing to explain how the claim that Bundy Auger Mining was allegedly told by the "owner Operator," that "it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan," applies to the requirements of the standard. [Further, the Motion offered] no explanation of the relationship between Bundy Auger and the unnamed 'owner Operator,' nor how that relationship would absolve Bundy from compliance with the standard or reduce the amount of its penalty liability [nor did the Motion explain] the asserted relevance of the claim that, if the miner was set back 20 feet . . .

Id. at 4-5.

Problems of the same ilk existed for the other matter, the section 104(d)(1) order, No. 9082935. That involved standard 30 C.F.R. § 77.1713(a), titled, "Daily inspection of surface coal mine; certified person; reports of inspection," which provides that,

> [a]t least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such

[3] The originally assessed total amount was $6,300.00, and the proposed settlement total is for $4,410.00.

> examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a).

The Order alleged that "[t]he operator failed to conduct an adequate on-shift examination to identify hazardous conditions in the active working area at the Taylor Highwall Mine, Pit #001." Decision Denying Settlement Motion at 5.

As set forth in more detail in the Decision Denying Settlement Motion, effectively only 17 words were offered to support the penalty reduction and those words were simply an echo of the justification presented for the other matter, Citation No. 9082933. As the Court noted, the justification was empty, being "devoid of any meritorious explanation for the proposed reduction." *Id.* at n.3.

The Secretary's Motion for Reconsideration

In conjunction with the Secretary's "Motion for Reconsideration," ("Reconsideration") the Secretary provided an "Amended Settlement Motion *with additional factual support*." ("Amended Motion"). Reconsideration at 1 (emphasis added).

Near the end of its lengthy resubmission, most of which is a regurgitation of material previously submitted, the Secretary finally offers in its Amended Motion for Citation No. 9082933 that

> [t]he subject violations were issued in the course of a technical compliance investigation of the Ground Control Plan submitted on March 9, 2015 for the *Moran Coal Company's*[4] Taylor Highwall Mine owned by ARJ Construction Co. ("owner Operator"). Bundy Auger is the independent contractor retained by ARJ to mine the Taylor Highwall. **ARJ was also issued citation No. 9082934 and Order No. 9082936 for violations of the same standard. Those violations were accepted as issued.** In reaching this settlement, the Secretary considered evidence gathered during a related 110(c) investigation that revealed that when similar over-steepened spoils were cited on March 26, 2015, Bundy Auger's foreman was instructed by the owner-operator that the only remedial effort required was moving the miner 20 feet back from the highwall. Respondent presented evidence that its agents were never instructed to develop or maintain berms along the base of the low wall. In addition, the contracting agreement between ARJ and Bundy

[4] There is no "Moran Coal Company." The Secretary acknowledged this in an email response to the Court's inquiry about this, advising, "References to Moran Coal were made in error. The Taylor Highwall Mine (ID No. 1800794) is owned by ARJ Construction. The related violations which were issued to ARJ, copies of which are attached, were not contested and accepted as issued. Citation 9082934 was assessed a penalty of $5,200 and Order 9082936 was assessed a penalty of $6,100. Both penalties have been paid in full." June 6, 2017 email to the Court from Solicitor's Office Attorney Helga Spencer

> provided that the responsibility of maintaining the pit rested solely with ARJ. After the miner was relocated, Bundy auger resumed mining of the highwall as it understood that this had been approved by MSHA per representations made by agents of the owner-operator. The Operator contends, and the issuing Inspector does not dispute that there was probable confusion concerning Bundy's understanding of what was required of it after similar conditions were cited by him on March 26.The evidence presented tended to indicate that Bundy Auger's agents were acting in good faith and with the understanding, albeit mistaken, that its actions were in compliance with MSHA and Inspector Jones' instructions. Therefore, the Secretary believes Respondent's negligence, while high was somewhat less than originally assessed and that the reduction of the assessed penalty in this particular case is consistent with his enforcement responsibility under the Mine Act.

Amended Motion at 4-5 (emphasis added).

The Amended Motion also provided, with regard to Order No. 9082935, that

> [e]vidence presented by Respondent and gathered during the course of MSHA's investigation indicate that in the week preceding the issuance of the subject violations, Bundy Auger's foreman had been conducting the requisite examinations and recording conditions in the pit, including instances of over-steepened spoils. Respondent presented evidence indicating, however, that it did not have the authority or the equipment necessary to lower the height of the low wall or expand the width of the pit and that such authority rested solely with ARJ. Additionally, the evidence presented indicated Bundy Auger's agents were acting in good faith and with the understanding that its actions were in compliance with MSHA and Inspector Jones' instructions. Therefore, the Secretary believes that the reduction of the assessed penalty in this particular case is consistent with his enforcement responsibility under the Mine Act.

Amended Motion at 6-7.

Accordingly, with this new submission, the Secretary now has provided facts sufficient to support the proposed penalty reduction and on that basis, the settlement is now approved. However, more must be expressed about persistent disconcerting elements in the amended settlement motion.

Although this Court has already provided in a number of its previous orders denying insufficiently supported settlements several examples from *the Secretary's own submissions* which contain the kind of facts needed in order to justify penalty reductions for proposed settlements, by the Amended Motion *in this very case*, the Secretary has again demonstrated that he fully knows how to provide the kind of supporting information required for the Commission to perform its statutory responsibilities under section 110(k) of the Mine Act and that it is neither burdensome nor difficult to provide this information.

Yet, before ultimately providing the needed supporting information, and then only in the context of its Amended Motion, the Secretary begins once *again* with his new formulation, which is an undisguised attempt to avoid presenting violation-related facts to support the reduced penalties.

Thus, the Secretary now routinely offers up, in place of useful information, the following language:

> In reaching the settlement, the Solicitor's Office reviewed Citations, the inspector's notes, and discussed at length, with the issuing inspector and other MSHA personnel, the positions between the parties during the course of negotiations. . . . In this case, the mine operator and the Secretary reached a compromise to resolve a docket of 2 contested violations and proposed the terms of the settlement agreement in a motion to the Court. [with the motion often adding that] [u]nder the proposed settlement, [mine operator's name inserted here] agreed to accept the violations as issued by the MSHA inspector, including the levels of gravity and negligence alleged [and the operator] also agreed to pay [some percentage of the original] penalty proposed by MSHA. . . . In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act. Thus, the Secretary requests that Court (sic) to reconsider rejection of the proposed settlement agreement.

Reconsideration at 2-3.

It must therefore be directly called out that what is going on here is a power struggle. As the language quoted above now appears routinely in the Secretary's settlement motions, it was not created by some maverick attorney within the Solicitor's Office but rather obviously originated at some higher level. But this is not a power struggle over some ambiguous provision of the Mine Act, the language for which it can be claimed equally by the Commission and the Secretary of Labor as containing unclear or indefinite terms. Rather, the terms of section 110(k) could not be more clear, providing, without ambiguity on the subject of "Compromise, mitigation, and settlement of penalty," that **"[n]o** proposed penalty **which has been contested**

before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled **except with the approval of the Commission**." 30 U.S.C. § 820(k) (emphasis added). Although the words in the provision could not be clearer, the legislative history also confirms the statutory terms and the Commission has made note of this fact in its decisions on this issue. Yet, the Secretary has treated the words in that Congressionally-expressed legislative history as "old," as if they had an expiration date. It should also be noted that one will not find the words "The Secretary" anywhere in section 110(k) and Congress certainly knew how to refer to the "Secretary of Labor" when it wanted to, as it defined "Secretary" in the Mine Act to mean the "Secretary of Labor" and then proceeded to refer to the Secretary of Labor *hundreds* of times in that Act, but with no such reference to the Secretary in section 110(k).

As the Court noted in its May 2, 2017 Order Denying Settlement Motion

> in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again* before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion, if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Order Denying Settlement at 6-7.

Emphasis about this point was made in the Court's May 19, 2017 Order Denying Secretary's Motion to Certify May 2, 2017 Order for Interlocutory Review, in *The American Coal Company* ("Interloc Denial") where it was observed that if the Secretary's position were accepted that

> [b]ased on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified.… Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable," then "all dockets for which all violations are admitted, could form the justification for a 30% reduction. But that is not all. As just mentioned, applying the same reasoning, if the principle were to be accepted, it could be applied to justify any other across-the-board percentage figure that the Secretary tossed out.

2017 WL 2306332 at *5 (emphasis omitted).

Restated, the Court also noted that

> if the Secretary's expression was deemed sufficient here, then in future cases, the Commission could not logically assert any section 110(k) considerations where all violations were admitted. Such a result would effectively neuter the

> Commission's review authority under section 110(k). Beyond ignoring the plain language of that section, the Commission could not reasonably object to a higher percentage reduction. Accordingly, if the Secretary's position were adopted, a 40 or 50 percent reduction, or more, would also fit within the Secretary's authority.

Id. (emphasis omitted).

WHEREFORE, with the above-described chronic problems identified, the amended motion for approval of settlement having provided legitimate factual grounds in support of the reduced penalties, the Motion is now hereby **GRANTED**.

Within 30 days of the date of this Order, Respondent shall send a check in the amount of $4,410 made payable to "U.S. Department of Labor/MSHA", to P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, the case is dismissed.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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June 15, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-0035 A.C. No. 11-02752-164722
v.	
THE AMERICAN COAL COMPANY, Respondent	Mine: Galatia Mine

DECISION AND ORDER ON REMAND

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., & Mark E. Kittrell, Esq., Salt Lake City, Utah, for Respondent

Before: Judge McCarthy

This case is before me upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act"). This docket involves two section 104(d)(2) orders issued to Respondent, American Coal Company ("Respondent"), for violations of 30 C.F.R. § 75.400 at Respondent's Galatia Mine.[1] For both Order No. 7490584 and Order No. 7490599, the Petitioner proposed the assessment of "flagrant" penalties under the "repeated failure" provision of section 110(b)(2) of the Act.

[1] 30 C.F.R. § 75.400 governs accumulations of combustible materials in underground coal mines. The regulation provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, shall be cleaned up immediately and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein."

I. STATEMENT OF THE CASE ON REMAND

A hearing was held in Henderson, Kentucky on August 23-24, 2011. During the hearing, the parties offered testimony and documentary evidence.[2] Witnesses were sequestered. I issued my initial Decision and Order on July 30, 2013. *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ).[3] For Order No. 7490584, I affirmed the Secretary's significant and substantial (S&S), unwarrantable failure, and flagrant designations. *Id.* at 2226-30, 2240-41, 2264-65. I modified Order No. 7490584 to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely," and to reduce the injury that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty." *Id.* at 2226-30. I assessed a civil penalty of $101,475. *Id.* at 2266-68. For Order No. 7490599, I also affirmed the Secretary's S&S, unwarrantable failure, and flagrant designations. *Id.* at 2230-31, 2240-41, 2264-65. I modified Order No. 7490599 to reduce the level of negligence from "high" to "moderate" and to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely." *Id.* at 2230-31, 2241. I assessed a civil penalty of $77,737. *Id.* at 2266-68.

Both the Secretary and Respondent filed Petitions for Discretionary Review, which the Commission granted on September 4, 2013. The parties submitted briefs, and the Commission held an open meeting on June 3, 2015. The Commission issued its decision on August 30, 2016. *American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016).

The Commission affirmed all of my holdings regarding Order No. 7490584. For Order No. 7490599, the Commission affirmed my gravity and unwarrantable failure findings, and vacated, in part, my determinations regarding both Respondent's negligence and the Secretary's flagrant designation. Specifically, then-Chairman Jordan, Commissioner Nakamura, and Commissioner Cohen found that substantial evidence supported my determination that the accumulations presented a smoke hazard that could reasonably be expected to cause death or serious bodily injury. *Id*. at 2078-29. Commissioner Young disagreed, and, joined by Commissioner Althen, wrote separately to recommend that that issue be remanded to me for further findings of fact in the first instance. *Id*. at 2079 n.22. Commissioners Young and Cohen also found that my determination regarding Respondent's knowledge of the accumulations cited in Order No. 7490599 was not supported by substantial evidence. *Id*. at 2080. Commissioner Althen joined in that finding, but wrote separately to argue that section 110(b)(2) requires actual knowledge, and not merely constructive knowledge. *Id*. at 2081 n.27; *see infra* pp. 19-20. Then-Chairman Jordan and Commissioner Nakamura dissented from the majority on the issue of Respondent's knowledge, and wrote separately to affirm my finding that Respondent had

[2] In this decision, "Tr.I-#" and "Tr. II-#" refer to the first and second volumes of hearing transcripts, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. Petitioner's Exhibit Nos. 1-31 and Respondent's Exhibit Nos. 1-43 were received into evidence at the hearing.

[3] This docket was stayed during the Commission's interlocutory review of *Wolf Run Mining Co.*, in which the Commission considered whether an operator's past violation history can be used to support allegations of "repeated" flagrant violations under section 110(b)(2). *American Coal Co.*, 35 FMSHRC at 2209; *see also Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013).

knowledge of the cited accumulations. 38 FMSHRC at 2080 n.25. Although Commissioner Cohen concurred with all parts of the majority opinion, he wrote separately to state his view concerning the broad interpretation of section 110(b)(2). Commissioner Young joined this concurring opinion. 38 FMSHRC at 2086.

In sum, a majority of the Commission remanded this docket to me for further consideration of three issues: (1) whether the Secretary established that Order No. 7490599 was a flagrant violation; (2) the level of Respondent's negligence in connection with the violation; and, if necessary, (3) reassessment of the civil penalty in accordance with my findings on remand. *American Coal Co*., 38 FMSHRC at 2085 (Jordan, Chairman; Cohen, Young, Nakamura, Althen, Comm'rs). After reconsideration of these issues on remand, I affirm the Secretary's original high negligence and flagrant designations for Order No. 7490599. I assess a civil penalty of $112,380.

II. PRINCIPLES OF LAW

A. "Repeated Flagrant" Designations under Section 110(b)(2) of the Act

Section 110(b)(2) of the Mine Act provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).[4] In light of the statutory language, the Commission has determined that there are five elements the Secretary must establish to uphold a flagrant designation: (1) there was a condition that constituted a violation of a mandatory health or safety standard; (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated." *American Coal*,

[4] Section 110(b)(2) was added to the Mine Act with the passage of the Mine Improvement and New Emergency Response Act of 2006 (the MINER Act), which Congress passed on August 17, 2006, following the Aracoma and Sago mine disasters. *Mine Improvement & New Emergency Response Act of 2006*, Pub. L. No. 109-236, sec. 8(a)(2), § 110(b)(2), 120 Stat. 493, 501 (June 15, 2006).

38 FMSHRC at 2066.[5] Thus, all violations designated as flagrant fall into one of two categories: they are either "reckless" flagrant violations, or "repeated" flagrant violations. In the instant case, the Secretary alleged that Order No. 7490599 was a "repeated" flagrant violation, rather than a "reckless" flagrant violation.

The Commission has recognized that the Secretary can prove repeated flagrant violations under either a "broad" or a "narrow" interpretation of section 110(b)(2). The Commission has described "broad" repeated flagrant violations as "recurrent-type violation[s]." *Wolf Run Mining Co.*, 35 FMSHRC at 543 n.15. Under the broad interpretation, the Secretary may introduce an operator's history of violations to show that the alleged violation was "repeated." The Secretary therefore establishes a "broad" repeated flagrant violation where he shows that the operator "failed to make reasonable efforts to eliminate at least one previous known violation that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury, prior to failing to make reasonable efforts to eliminate the known violation alleged to be flagrant." 35 FMSHRC at 2248.

At hearing in the instant matter, the Secretary argued that both Order No. 7490584 and Order No. 7490599 were repeated flagrant violations by virtue of Respondent's past history of similar section 75.400 violations. 35 FMSHRC at 2254-55. In essence, the Secretary adopted the broadest possible interpretation of section 110(b)(2), taking the position that the mere existence of one or more prior similar violations may be sufficient to support a flagrant designation under the broad interpretation of "repeated." 35 FMSHRC at 2247. I noted that in addition to advancing "constantly evolving interpretations of section 110(b)(2) in litigation before the Commission and its judges," the Secretary failed to engage in substantive notice and comment rulemaking regarding the flagrant provision's meaning. I therefore declined to defer to the Secretary's interpretation.[6] 35 FMSHRC at 2253-58; *see also Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

Although the Commission's decision in *Wolf Run* established that an operator's history of violations is relevant to proving a "repeated" flagrant violation, the precise contours of the broad interpretation remain unsettled. *See* 38 FMSHRC at 2100 n.4 (Comm'r Althen, dissenting); *see, e.g.*, *Blue Diamond Coal Co.*, 36 FMSHRC 541, 550 (Feb. 2014) (ALJ) ("[T]he narrow,

[5] In my initial Decision and Order, I found that the Secretary must prove the following elements in order to establish a repeated flagrant violation: (1) a repeated failure, (2) to make reasonable efforts to eliminate, (3) a known violation of a mandatory health or safety standard, (4) that substantially and proximately caused or reasonably could have been expected to cause, (5) death or serious injury. 35 FMSHRC at 2258 (citing *Wolf Run Mining Co.*, 35 FMSHRC 734, 735 (Mar. 2013) (ALJ); *Wolf Run Mining Co.*, 34 FMSHRC 337, 345 (Jan. 2012) (ALJ); *Stillhouse Mining LLC*, 33 FMSHRC 778, 802 (Mar. 2011) (ALJ)).

[6] In their concurring opinion, Commissioners Cohen and Young also declined to extend *Chevron* deference to the Secretary's broad interpretation of section 110(b)(2). They found that the Secretary's formulation "offered no principled basis for making the determination" regarding whether and when a prior violation would be sufficient to support a finding that a subsequent violation amounted to a repeated flagrant violation. They thus concluded that the Secretary's formulation "lacks practical utility for Commission judges." 38 FMSHRC at 2087-88.

interlocutory nature of the Commission's *Wolf Run* decision leaves open the level of similarity and or pervasiveness necessary for past conduct to prove a present violation as a repeated failure under section 110(b)(2) of the Mine Act."). I determined in my initial Decision and Order that the broad interpretation requires the Secretary to show that the prior violation or violations introduced as part of an operator's past violation history must have been "known" to the operator and either killed or seriously injured a miner, or reasonably could have been expected to kill or seriously injure a miner. 35 FMSHRC at 2248-49. I suggested that the Secretary could demonstrate an operator's knowledge of a prior violation through "a high negligence stipulation or proof of knowledge in the unwarrantable failure analysis." *Id*. at 2249. Likewise, the Secretary could demonstrate the requisite gravity by showing that a prior violation was designated as "permanently disabling" or "fatal," i.e., the violation reasonably could have been expected to cause death or serious bodily injury. *Id*.

The majority of the Commission, perhaps failing to reach a consensus, did not address the approach to the broad interpretation that I detailed in my initial Decision and Order. Instead, the majority directed that I fashion my own broad interpretation "which permits the Secretary to establish a violation as flagrant by taking the operator's history of previous accumulations violations into account." 38 FMSHRC at 2082. Although the Commission majority declined to provide guidance relating to the broad interpretation, three Commissioners wrote separately to provide their views on the broad interpretation. Commissioner Cohen, joined in his concurring opinion by Commissioner Young, recognized that "the essence of a repeated violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." 38 FMSHRC at 2087 (Cohen & Young, Commr's, concurring). Commissioners Cohen and Young found my characterization of the broad interpretation to be too narrow, and disagreed that the Secretary must prove the knowledge element for each prior citation or order introduced into the record to support the flagrant designation at issue. *Id*. Thus, "while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria." *Id.*

Although Commissioners Jordan and Nakamura did not directly address the broad interpretation, they stated that they nevertheless felt "constrained to comment on the substance of [Commissioner Cohen's and Commissioner Young's] suggested approach" because it "raises as many questions as it strives to answer." *Id*. at 2095 (Chairman, Jordan and Comm'r, Nakamura, concurring and dissenting). They noted, for example, that their colleagues' guidance did not clearly delineate how the Secretary would prove that prior violations amounted to a "known pattern" or were "substantially similar" to the subsequent violation, and they wondered whether the Secretary would be compelled to produce specific evidence on all of the prior violations. In other words, they seemed skeptical of an approach that would require the Secretary to litigate aspects of prior violations. Despite this apparent skepticism, Chairman Jordan and Commissioner Nakamura did not explicitly opine on whether a known history of similar violations, without more, could be enough to support a repeated flagrant finding. *Id*. at 2096.

Then-Commissioner Althen (now Acting Chairman Althen) also addressed the broad interpretation in his concurring and dissenting opinion.[7] He made two arguments: first, the plain language of section 110(b)(2) refers to a single, specific violation, *id*. at 2108-09 (Althen, Comm'r, concurring in part and dissenting in part); and second, the practical application of the Commission's interpretation of section 110(b)(2), as presented in its *Wolf Run* decision, raises insurmountable procedural concerns relating to fair notice and due process. *Id*. at 2111-12. As a result, Commissioner Althen concluded that an operator's history of prior violations is not relevant to a flagrant determination, and only single, continuing violations may be designated as flagrant. *Id*. at 2108.

Commissioner Althen argues first that the plain language of section 110(b)(2) refers to "a single, specific violation—"a known violation."" *Id*. at 2108. This plain language construction is supported by "the uniqueness of a flagrant violation" in the Mine Act's enforcement scheme:

> Congress has established a scheme of "increasingly severe sanctions for increasingly serious violations of operator behavior." At the far end, those progressive sanctions apply to violations resulting from [the] highest levels of negligence—that is, gross negligence or reckless disregard (unwarrantable failures) and violations that could contribute significantly and substantially to the likelihood of serious injuries (S&S violations). For unwarrantable failure violations, the progressive discipline culminates in a difficult to break chain of withdrawal orders under section 104(d). For S&S violations, the progressive discipline culminates in a perhaps more difficult to break chain of withdrawal orders under section 104(e). Such violations carry a maximum civil penalty of slightly less than $70,000.

38 FMSHRC at 2101 (internal citations omitted).

Recognizing that the MINER Act was passed in direct response to serious mine disasters, Commissioner Althen argues that section 110(b)(2) was enacted to "penalize severely any violations where operator conduct goes substantially beyond violations previously established in the Mine Act." *Id*. at 2105. Thus, the gravity aspect for flagrant violations (death or serious bodily injury) goes beyond the gravity required for S&S violations (reasonably likely to result in a reasonably serious injury). *Id*. at 2105. Likewise, "[a] flagrant violation . . . goes beyond the level of extreme negligence or reckless disregard already dealt with as unwarrantable failures and the requirement of reasonable expectation of death or serious bodily injury essentially reaches the gravity level necessary for an imminent danger." *Id*. at 2105. Commissioner Althen recognizes that "clearly, a uniquely violative circumstance is at the heart of a 'flagrant' violation[:] … failing repeatedly to correct a specific violation of which the operator has knowledge and is so serious that it creates a reasonable expectation of death or serious injury." *Id.* at 2109. Commissioner Althen therefore argues that allowing the use of an operator's history of violations renders section 110(b)(2) a duplicative enforcement mechanism to those contained in sections 104(e) and 110(b)(1), both of which deal with an operator's failure to abate already-

[7] Acting Chairman Althen did not join the Commission until August of 2013, and therefore did not participate in the Commission's *Wolf Run* decision. 35 FMSHRC 536 (Mar. 2013).

cited conditions.[8] Unlike section 104(e) and section 110(b)(1), Commissioner Althen argues that the plain language of section 110(b)(2) does not require that the "known violation" must be a violation which has already been cited. 38 FMSHRC at 2110 n.9 (Althen, Comm'r, concurring and dissenting). Thus, when viewed as part of the Mine Act's progressively severe enforcement scheme, the plain language of Section 110(b)(2) does not permit the consideration of an operator's past violation history, in Commissioner Althen's view.

While Commissioner Cohen and Commissioner Young argue that an operator's history of violations may be introduced to show a pattern of neglect or a common, disregarded cause of similar violations, Commissioner Althen recognizes that using an operator's history of violations for this purpose presents concerns regarding fair notice and due process. As the Commission has acknowledged, its broad interpretation of section 110(b)(2) provides no notice to operators regarding the "number, type, or similarity of prior violations that would be necessary for prior violations to sustain a flagrant penalty." *Id*. at 2111. Commissioner Althen also observed (as I did in my initial Decision and Order) that

> a new violation could only "repeat" a prior violation if such prior violation and the new violation share the same fundamental elements. Here, that means that in the prior violation the operator (1) failed to eliminate a known violation that (2) could reasonably be expected to cause death or serious injury. . . . [T]he vast majority of prior violations do not demonstrate either that the operator had

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[8] Section 104(e)(1) provides:

> If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(e)(1). Section 110(b)(1) provides:

> Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $7,500 for each day during which such failure or violation continues.

30 U.S.C. § 820(b)(1).

> knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury.

Id. at 2114; *see also* 35 FMSHRC at 2249. As Commissioner Althen argues, the mere occurrence of a prior violation, "standing alone," does not demonstrate the requisite negligence and gravity elements required for a flagrant violation, i.e., an S&S violation need not necessarily be expected to cause "death or serious bodily injury," and an unwarrantable failure designation does not necessarily require that the violation was "known" to the operator. *See* 38 FMSHRC at 2115. Consequently, the "vast majority of prior violations do not demonstrate either that the operator had knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury." *Id*. at 2114. Commissioner Althen therefore concludes that "the clear purpose of section 110(b)(2) is to incentivize operators strongly to eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition." *Id*. at 2110.

I find Commissioner Althen's reasoning to be clear, sensible, and highly persuasive. He additionally noted that Judge Barbour and Judge Feldman have also persuasively explained that "the plain statutory language in section 110(b)(2) with respect to 'repeated conduct' refers to a single known violation, rather than a series of recurring violations." *Id*. at 2109 (citing *Conshor Mining, LLC*, 33 FMSHRC 2917, 2927-28 (Nov. 2011) (ALJ Feldman)); *see also Wolf Run Mining Co.*, 34 FMSHRC 337, 346 (Jan. 2012) (ALJ Barbour), *rev'd*, 35 FMSHRC 536 (Mar. 2013). After reconsideration of this issue, and after considering the Commissioners' separate comments on the broad interpretation, including several Commissioners' rejection of my efforts to fashion a broad interpretation consistent with the statutory language of section 110(b)(2) after *Wolf Run*, I decline to address the broad interpretation.[9]

As an alternative to the "broad" interpretation, the Commission adopted my characterization of the second approach to establishing repeated flagrant violations as the "narrow" interpretation of section 110(b)(2). Under that interpretation, the Secretary is

> required to show that the cited and assessed violation, discreetly [sic] and without reference to the operator's past violation history . . . was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e. known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities (repeated failure to take reasonable steps to eliminate).

American Coal Co., 38 FMSHRC 2063, 2065 (Aug. 2016); *see also Wolf Run Mining Co.*, 35 FMSHRC 536, 543 n.14 (Mar. 2013). In other words, the broad interpretation involves multiple, separate instances of recurring violations, whereas the narrow interpretation involves only a single, ongoing violation.

[9] If I were writing on a clean slate, I would be inclined to concur with the well-reasoned opinions of Commissioner Althen, Judge Feldman, and Judge Barbour that a series of separate, recurring violations should not constitute the basis for a finding of a repeated flagrant violation.

B. Negligence Principles

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by the standard violated); *Spartan Mining Co.*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry is circumscribed by the scope of duties imposed by the regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in the Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of alleged mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Assessment Principles

Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a). The operator has the right to contest the Secretary's proposed penalty assessment. *Id*. This contest results in a penalty proceeding before the Commission. There is no requirement in the Mine Act or its regulations mandating that the Secretary explain the basis for his proposed penalty when he makes the discretionary decision to specially assess a penalty. 30 C.F.R. § 100.5.

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider the six statutory criteria set forth in section 110(i) and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g*., *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criterion. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are not bound by the Secretary's proposed assessment or by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th

Cir. 1984)); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC at 601.

In another recent *American Coal* decision, the majority of Commissioners (Young, Cohen and Althen), observed that

> [f]or either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently, and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

38 FMSHRC 1987, 1995 (Aug. 2016). In that decision, MSHA issued a special assessment without explaining the basis for the special assessment in its Narrative Findings. *Id.* at 1996. The majority noted that the Secretary bears the burden of "providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." *Id*. at 1993. "When a violation is specially assessed, that obligation may be considerable." *Id*. While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must "be attentive to the rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge's findings and conclusions." *Id*.

III. FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW ON REMAND

MSHA inspector Steven Miller issued Order No. 7490599 on September 23, 2007, alleging a violation of 30 C.F.R. § 75.400 based on the following condition:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Flannigan Tailgate conveyor belt. The accumulations measured approximately 6 inches to 14 inches in depth. Loose coal and coal float dust also extended outby the tail roller approximately 450 feet as well. The area was black and the turning tail roller was suspending float coal dust into the atmosphere. The bottom belt and bottom rollers were in contact with these accumulations.

P. Ex. 3. As noted above, I found in my initial Decision and Order that the cited accumulations constituted a violation of the mandatory safety standard at § 75.400. I found the violation to be S&S and reasonably likely to result in serious and possibly fatal injuries, including injuries from smoke inhalation, carbon monoxide poisoning, burns, or entrapment, to the six miners working inby the hazard. I further found that the violation constituted an unwarrantable failure to comply with the cited standard. These findings were not disturbed on appeal.

The sole matters I must address on remand are the "flagrant" designation, the operator's degree of negligence, and the penalty. 38 FMSHRC at 2085.

A. The Violation in Order No. 7490599 Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

In my initial Decision and Order, I found that the accumulations at the pony belt and Flannigan tailgate intersection were reasonably likely to contribute to a mine fire that would result in serious and possibly fatal injuries to the six miners on the working section inby the belts:

> In the condition cited in Order No. 7490599, the accumulations were much closer inby [than the conditions cited in Order No. 7490584], only a few crosscuts removed from the working section. Tr. I-121. There appears to be no stoppings that would isolate escaping miners from the effects of a fire. *See* R. Ex. 4, at 5. As the miners would be exposed to an unmitigated smoke hazard, I affirm Miller's determination that any injuries that were to occur from a fire could reasonably be expected to result in serious, possibly fatal injuries. In addition, based on Miller's uncontroverted testimony that only the miners working inby the Flannigan Tailgate would be exposed to the hazardous condition, I find that the number of miners affected is six. Tr. I-121.

35 FMSHRC at 2231.

Respondent challenged my findings, arguing on appeal that substantial evidence did not support my determination. Respondent specifically argued that Respondent's Exhibit 4, a mine map used to illustrate witness testimony at trial, was not prepared for use as evidence regarding the existence and location of stoppings, and that I therefore erred in relying on that exhibit to support my finding that there were no stoppings isolating miners from the potential ignition source at the belt intersection. 38 FMSHRC at 2078.[10]

In its decision on appeal, the Commission majority of then-Chairman Jordan, Commissioner Nakamura, and Commissioner Cohen accepted Respondent's argument regarding Respondent's Exhibit 4, without critique, and found that my possible misuse of the mine map

[10] Absent a limited proffer or stipulation that has been received into evidence, I am aware of no evidentiary principle that restricts an Administrative Law Judge from interpreting a document consistent with its markings and witness testimony, as I did here with the testimony of foreman Raney. *See* Tr. II-20-46, 101-102. Respondent made no such limited proffer at hearing regarding the use of Respondent's Exhibit 4, nor did the Secretary and Respondent offer any agreed-upon stipulations regarding any of the exhibits received into evidence at the hearing. Tr. I-28-33. I also note that the Federal Rules of Evidence do not directly apply to Commission proceedings. *Leeco, Inc.*, 38 FMSHRC 1634, 1639 (July 2016).

constituted harmless error.[11] The Commission majority concluded that substantial evidence supported my findings regarding the section crew's exposure to the possible smoke hazard. 38 FMSHRC at 2078-79.[12]

[11] Commissioner Young dissented, and took issue with the majority's decision (at the Secretary's request) to make a discrete "finding in support of their conclusion that death or serious injury to miners could reasonably be expected to result from the accumulations [at issue] here." 38 FMSHRC at 2092. He argued that "where the Judge errs in failing to understand the evidence presented . . . our standard practice is to remand the case to him to make the necessary findings of fact in the first instance, using a correct understanding of the evidence." *Id*. (citing *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1676-77 (Dec. 2010) (vacating Judge's affirmance of citation and remanding for factual determination and to address operator's argument erroneously unaddressed)). Commissioner Young further stated that "remand on the issue of the gravity [of the violation in Order No. 7490599] was clearly necessary" since my findings rested on "clear error." *Id*. Commissioner Althen joined in Commissioner Young's partial dissent on this issue. *Id*. at 2079 n.22.

[12] The majority opinion also stated that "[t]he Secretary concedes that the Judge misconstrued the evidence and that there were in fact stoppings between the primary and secondary escapeways on the Flannigan Tailgate belt." 38 FMSHRC at 2078 (citing S. Br. at 21, Tr. II-37-46; R. Ex. 4 at 5). That is an overstatement. In his Response Brief on appeal, the Secretary stated, in full:

> American Coal asserts that the ALJ erroneously relied on a "demonstrative exhibit" to find that there were no stoppings that would isolate escaping miners from the smoke generated by a fire. R. Br. at 49-52. That finding, American Coal contends, is "wholly inconsistent with testimony and other evidence adduced at trial on this very issue." *Id*. at 49. The Secretary does not dispute that stoppings isolated the belt entry from the primary and secondary escapeways in the Flannigan Tailgate. The pony belt, however, was not located in the Flannigan Tailgate, but rather was located in the set-up area for the longwall panel. Tr. II-37-42; R. Ex. 4 at 5. The pony belt intersected the belt in the Flannigan Tailgate at a 90 degree angle. *Id*.; *see also* Tr. I-356; R. Ex. 4. at 5. In testifying that stoppings isolated the belt entry in the Flannigan Tailgate from the primary and secondary escapeways in the Flannigan Tailgate, Section Foreman Rocky Raney specifically emphasized that he was not talking about the pony belt. Tr. II-101-102. Raney's testimony is consistent with the "demonstrative exhibit" the ALJ relied on in finding no stoppings isolating the pony belt entry from the adjacent entry where the crew was working in the longwall set-up area. R. Ex. 5. Raney's testimony is also consistent with American Coal's approved ventilation plan, which required stoppings separating intake and return air courses "up to an[d] including fourth connecting crosscut outby the working faces." R. Ex. 18 at TACC001635. Under that plan, stoppings were not required between the pony belt entry in the longwall panel set-up area and the adjacent entry in which the crew was working at the face, which was approximately six cross-cuts inby the
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> (continued…)

In any event, Respondent is enjoined by the law of the case as set forth in the Commission majority opinion from re-litigating this issue on any appeal from this Decision and Order on Remand. Nevertheless, given the split Commission and the expiration of Commissioner Nakamura's term, I write briefly here to clarify my factual findings.

In my initial Decision and Order, I stated that "[t]here appear to be no stoppings to isolate escaping miners from the effects of a fire. *See* R. Ex. 4 at 5." 35 FMSHRC at 2231. Having reviewed the record on remand, I recognize that that statement was perhaps overbroad. As the Respondent argued, the record demonstrates that stoppings *do* isolate the primary and secondary escapeways from the potential ignition point at the Flannigan Tailgate and pony belt intersection. R. Ex. 5 at 1-2; R Ex. 4 at 5. The primary and secondary escapeways, however, are located *outby* the belt intersection where the accumulations were discovered. R. Ex. 4, at 5. The section crews were working *inby* the ignition point at the belt intersection, no more than two or three crosscuts outby the working face. R. Ex. 20 at 33, 35, 37, 39, 41, and 43; R. Ex. 5 at 1-2; R. Ex. 4 at 5. While the stoppings separating the primary and secondary escapeways would have isolated evacuating miners from smoke once they passed outby the belt intersection, there were no stoppings inby that point. Respondent's "approved ventilation plan only required stoppings separating [the] intake and return air course[s] up to and including the fourth connecting cross-cut outby the working faces." 38 FMSHRC at 2078 (citing R. Ex. 18 at 7). While evacuating miners would have been isolated from the effects of a fire once they reached the primary or secondary escapeway, they would have been exposed to the effects of a fire until they reached the escapeways.

I therefore conclude, as did the majority of Commissioners, that "the evidence demonstrates that the pony belt entry, which ran from its intersection with the Flannigan Tailgate to the set-up area for the longwall panel[,] lacked stoppings," and therefore the miners working inby the pony belt and Flannigan Tailgate belt intersection would be exposed to smoke in the event of an ignition resulting from the accumulations at issue in Order No. 7490599. 38 FMSHRC at 2078; *see* Tr. II-42, R. Ex. 4 at 5. In these circumstances, I reaffirm my finding that the smoke to which the miners were reasonably likely to be exposed in the event of an ignition could reasonably have been expected to cause death or serious bodily injury. 30 U.S.C. § 820(b)(2).

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[12] (…continued)

> site of the violation and approximately four cross-cuts inby the feeder for the pony belt. Tr. II-42; R. Ex. 4 at 5.

S. Resp. Br. at 21 (footnotes omitted). In my opinion, this is not a concession by the Secretary that I misconstrued the evidence, but an argument that the operator has misconstrued my findings. While the Secretary agrees that stoppings separated the escapeways *at the Flannigan Tailgate*, he argues that the evidence supports my determination that there were no stoppings isolating the working miners from the cited accumulations and potential ignition sources *at the pony belt*. I therefore respectfully disagree with the Commission majority's characterization of the Secretary's argument as a concession that I misconstrued the evidence.

B. The Violation in Order No. 7490599 Resulted from Respondent's Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

Commissioners Young, Cohen, and Althen, writing for the Commission majority, also remanded the issue of whether Respondent repeatedly failed to make reasonable efforts to eliminate a known violation. In my initial Decision and Order, I credited inspector Miller's testimony that the accumulations existed for at least two shifts. Tr. I-108; 35 FMSHRC at 2236. In addition, I relied on Respondent's printed production and delay ("P&D") reports and testimony from section foreman Rocky Raney to infer that Respondent had constructive knowledge of the cited accumulations for at least two shifts prior to the Order's issuance, but nevertheless failed to address them. 35 FMSHRC at 2239, 2259, and 2265; *see also* Tr. II-66-68. The printed P&D reports document the electrical issues with the pony belt that caused it to intermittently start and stop during the five shifts preceding the issuance of Order No. 7490599. R. Ex. 21. Raney testified that the pony belt's starting and stopping problems could cause spillage and float coal dust accumulations around the belt. Tr. II-66-69. Based on the pony belt's documented electrical issues and Raney's acknowledgment that such issues can cause accumulations, I concluded that Respondent "knew or should have known that the violation existed for at least two shifts." 35 FMSHRC at 2265.

The Commission majority found that my "analysis of the evidence of [Respondent's] knowledge of the accumulations was insufficient."[13] 38 FMSHRC at 2080. The Commission majority characterized my reliance on Respondent's printed P&D reports as "problematic," because, in contrast to the handwritten P&D reports created by the section foremen during their shifts, the printed P&D reports were not "printed until the morning of September 24, the day after [Respondent] was cited for the accumulations." *Id*. at 2080; *see also* R. Exs. 20 (handwritten P&D reports) & 21. In addition, the Commission majority noted that the cited accumulations were not recorded in the pre-shift and on-shift examination books. *See* R. Ex. 25. The Commission recognized that inspector Miller did not "issue a citation or order to [Respondent] for having failed to conduct a proper examination of the belts during the preceding shifts," despite his opinion regarding the duration of the accumulations and the lack of any record of them in the belt examination books. 38 FMSHRC at 2080. Although I credited Miller's testimony regarding the duration of the violation and consequently inferred from the P&D reports and Raney's testimony that Respondent "knew or should have known" about them prior to the issuance of Order No. 7490599, the Commission majority concluded that it could not determine whether my inference was reasonable because I did not give consideration to possible alternative conclusions regarding why Miller failed to cite Respondent for an inadequate belt exam. Therefore, in addition to reviewing the record evidence to "determine at what point, prior

[13] Chairman Jordan and Commissioner Nakamura dissented from this holding, and wrote separately to affirm the flagrant determination for Order No. 7490599. They found that "substantial evidence supports [my] decision regarding the extent to which AmCoal was or should have been aware of the accumulations." *American Coal Co.*, 38 FMSHRC at 2093 (Jordan, Chairman & Nakamura, Comm'r, dissenting). Commissioner Althen joined in the majority decision to remand the issue, but also wrote separately to express his opinion that the plain language of section 110(b)(2) requires that the operator have actual knowledge (rather than constructive knowledge) of the violation. 38 FMSHRC at 2099 (Althen, Comm'r, concurring and dissenting).

to Miller's discovery of the accumulations, [Respondent] should have become aware of the accumulations," the Commission majority directed that I also consider: (1) whether the accumulations were not included in the belt examination records because they did not exist at the time the exams were conducted, or (2) whether "Miller, exercising his discretion, decided not to cite [Respondent] for failure to conduct a proper belt examination." 38 FMSHRC at 2080-81.

I begin my review of the record with the handwritten P&D reports. Both the printed and the handwritten P&D reports generally identify the same delays, but the handwritten P&D reports contain the exact start and stop times for each delay (e.g., from 1:15 a.m. to 1:45 a.m.), while the printed P&D reports record only the length of the delay (e.g., 30 minutes). *See* R. Exs. 20 & 21. The handwritten P&D reports also contain additional information, including the time the crew arrived and departed the section, when and where each cut was made, and when the first and last shuttle cars of coal were loaded onto the belt. *See, e.g.* R. Ex. 20 at 32.

Galatia North mine operated three shifts: foreman Jim Gass's shift from 12:00 a.m. to 8:00 a.m., foreman Randy Robertson's shift from 8:00 a.m. to 4:00 p.m., and foreman Rocky Raney's shift from 4:00 p.m. to 12:00 a.m. Although the shifts began at 12:00 a.m., 8:00 a.m., and 4:00 p.m., respectively, the crews were "hot-seating" each shift, meaning the working crew would wait on the section until replaced by the next crew. Due to the hour-long travel time from the mine portal to the working section, the shift crews would change at approximately1:00 a.m., 9:00 a.m., and 5:00 p.m., respectively. *See* R. Ex. 20; Tr. II-303-04. Respondent entered into the record handwritten P&D reports for the five shifts preceding the issuance of Order No. 7490599, and for the shift during which Miller issued Order No. 7490599. I summarize the relevant information for each shift below.

The handwritten reports indicate that the pony belt was already experiencing electrical issues when foreman Jim Gass arrived on the section with his crew at 1:15 a.m. on September 22, 2007. There were four pony belt delays (resulting in a total of 122 minutes of downtime for the pony belt) during Gass's eight-hour shift. The belt was down for 30 minutes from 1:15 a.m. until 1:45 a.m., for another 30 minutes from 1:46 a.m. to 2:16 a.m., for 55 minutes from 4:10 a.m. to 5:05 a.m., and for seven minutes from 8:23 a.m. until 8:30 a.m. The notation recorded next to the 55-minute delay explains that the "unit pony belt would not stay running," indicating that the belt may have been subject to additional starts and stops beyond the four recorded. Gass and his crew left the section at 9:15 a.m. R. Ex. 20 at 32.

The pre-shift examination for the shift following Gass's (headed by section foreman Randy Robertson) was conducted concurrently with the last part of Gass's shift from 4:00 a.m. to 8:00 a.m. on September 22, 2007. R. Ex. 25 at 1. The pre-shift examiner noted that the head area of the Flannigan Tailgate belt was "sloppy." *Id*. The subsequent on-shift examination report indicates that the belt head area was cleaned by Robertson and his section crew during the subsequent shift. R. Ex. 25 at 2. This entry, made more than 36 hours before Miller issued Order No. 7490599, is the only indication that accumulations existed around the belt area prior to the issuance of Order No. 7490599.

The P&D reports show that there were two pony belt outages totaling 80 minutes of downtime during the shift following Gass's. Robertson and his section crew arrived on the

section at 9:15 a.m., indicating that Gass's crew waited until Robertson's crew arrived before leaving the working section.[14] The first pony belt stoppage lasted for 50 minutes, from 1:50 p.m. until 2:40 p.m. The second stoppage lasted for 30 minutes, from 4:20 p.m. until 4:50 p.m. Robertson's crew dumped the last shuttle car of coal onto the belt at 5:05 p.m. and departed the section at 5:10 p.m. R. Ex. 20 at 34.

The P&D report for the final shift on September 22, 2007 also shows two pony belt outages. Raney's crew arrived on the section at 5:15 p.m., and the first pony belt outage occurred about two hours and forty-five minutes later from 8:00 p.m. until 8:30 p.m. due to a problem with the pony belt's ground fault. *See* R. Ex. 21 at 2; R. Ex. 20 at 36. The second outage began at 11:50 p.m. and continued until the end of the shift when Raney's crew left the section at 1:00 a.m. R. Ex. 20 at 36.

On September 23, 2007, the day Order No. 7490599 was issued, the handwritten P&D reports show that there were a total of four pony belt outages equaling a total of 195 minutes of belt downtime during Jim Gass's shift.[15] Gass and his crew arrived on the section at 1:15 a.m., 15 minutes after Raney's crew departed the section. The first three outages, totaling 75 minutes of downtime, occurred as a result of problems with the "pony belt ground fault." Those outages occurred from 2:00 a.m. to 2:25 a.m., from 4:00 a.m. to 4:30 a.m., and from 5:15 a.m. to 5:35 a.m. During the remaining 120 minutes of outage, which occurred from 7:00 a.m. until 9:00 a.m., the "pony belt would not run for more than 2-3 min[utes] and [then] kick [the] breaker." R. Ex. 20 at 38. Gass also included a notation in the handwritten P&D report that the section crew "scooped and dusted and serviced equip[ment] during [the] downtime."[16] *Id*. Gass and his crew left the section at 9:15 a.m. *Id*. Inspector Miller testified that the accumulations existed at least as early as this shift. Tr. I-108.

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[14] Robertson appears to have been misidentified as section foreman Rocky Raney in the printed P&D report for the second shift on September 22, 2007. R. Ex. 21 at 2. The handwritten report, however, indicates that Robertson, and not Raney, was the section foreman for that shift. R. Ex. 20 at 34. Since the handwritten reports were prepared by the section foreman over the course of the shift, I rely on the handwritten P&D report.

[15] The printed P&D report for Gass's shift on September 23 consolidates the first three outages into one entry indicating a 75-minute outage, but otherwise corroborates the information contained in the handwritten report. R. Ex. 21 at 2.

[16] Gass's crew "scooped & dusted & serviced equip[ment]" during the two-hour delay that occurred from 7:00 a.m. to 9:00 a.m. on September 23. This notation is included in the P&D report section titled "Explanation of Delays." R. Ex. 20 at 38. Immediately above that section, in the "Comments" section for the entries to "Mining Details," Gass made the following notation: "Dusted Unit, Scooped Unit, Serviced Equipment During [Down] Time." (Instead of the word "down," the actual notation contains an arrow pointing down. I interpret the arrow to mean "down.") *Id*. I infer that "unit" refers to "mechanized mining unit," or MMU, a commonly-used mining term. I therefore conclude that "unit" refers to the MMU, or the equipment at the working face, rather than the pony belt and Flannigan Tailgate belt intersection outby the working section.

Robertson and his crew arrived on the section at 9:15 a.m. on September 23, 2007. His handwritten P&D report shows two pony belt delays: a 30-minute delay from 9:15 a.m. to 9:45 a.m. resulting from a bad ground monitor card, and a 30-minute delay from 12:50 p.m. to 1:20 p.m. resulting from an issue with the AMR, a type of electrical card. R. Ex. 20 at 40; Tr. II-65. Raney testified that Robertson's shift "found the problem" and fixed the pony belt electrical issue. Tr. II-65. Neither the handwritten nor the printed P&D reports show ongoing issues with the pony belt after Robertson and his crew left the section at 5:15 p.m. on September 23, 2007. Raney also confirmed that the P&D reports (both handwritten and printed) do not reflect any pony belt issues after he and his crew arrived on the section at 5:15 p.m. R. Ex. 20 at 42; R. Ex. 21 at 3; Tr. II-66. As noted above, Order No. 7490599 was issued at 6:45 p.m. on September 23rd, about an hour and a half after Raney arrived on the section with his crew.

The handwritten and printed P&D reports demonstrate that mine management was well-aware that the pony belt was having significant electrical and operational issues during the five shifts preceding issuance of Order No. 7490599. These electrical problems led to multiple instances where the pony belt was starting and stopping intermittently over the course of each shift. R. Exs. 20, 21. Foreman Jim Gass's September 22 shift experienced four pony belt delays, which resulted in 122 minutes of downtime. Foreman Randy Robertson's September 22 shift experienced two delays, which resulted in 80 minutes of downtime. Foreman Raney's September 22 shift experienced two delays, which resulted in 140 minutes of downtime. On September 23, Gass's shift experienced four delays, which resulted in 195 minutes of downtime, and Robertson's shift experienced two delays, resulting in 60 minutes of downtime. R. Ex. 20 at 32-42, R. Ex. 21 at 8-10. As then-Chairman Jordan and Commissioner Nakamura emphasized in their dissenting opinion, "the daily reports indicate electrical and breaker problems with the belt during all three shifts on September 22nd, which grew worse during the first two shifts on September 23rd, before repairs were made on the second shift." 38 FMSHRC at 2094 (citing Tr. II-61-66, R. Ex. 20 at 8-10).

Foreman Raney admitted that the recurrent stopping and starting that characterized the pony belt delays on September 22 and 23 could cause spillage from the pony belt and float coal dust accumulations around the belt, especially if the coal had been sitting on the belt for an extended period of time and had consequently dried out. Tr. II-68, 70. As the handwritten P&D reports show, there was, in fact, coal sitting on the belt during the production delays. *See* R. Ex. 20 at 38-43. During Robertson's September 23rd shift (the shift before Miller and Meyer observed the accumulations), the crew dumped 18 shuttle cars of coal prior to 4:00 p.m., despite the two separate pony belt delays from 9:15 a.m. to 9:45 a.m. and from 12:50 p.m. to 1:20 p.m. R. Ex. 20 at 41. During Gass's shift on September 23 (the shift identified by Miller as the latest point in time when the accumulations would have been present), the crew loaded ten shuttle cars of coal onto the belt between 6:00 a.m. and 7:00 a.m. The belt then went down for two hours and the crew was subsequently unable to get the belt to run for more than two to three minutes at a time. R. Ex. 20 at 39.

Raney also testified that the feeder, if not manually turned off during belt stoppages, would continue to grind the coal stalled on the belt, creating float coal dust that would be suspended in the air once the belt was turned back on and coal was transferred from the pony belt

to the Flannigan Tailgate belt. Tr. 68-69.[17] Although there was no specific testimony regarding whether Respondent had a policy or practice of turning off the feeder during belt delays, Miller observed loose coal and float coal dust extending 450 feet outby the tail roller. P. Ex. 3. In addition, Miller found that the bottom belt and bottom rollers of the pony belt were in contact with the accumulations, and determined that "the tail roller was suspending float coal dust into the atmosphere," which would take at least more than one shift to occur. P. Ex. 3; Tr. I-206-07. Given the frequency of belt delays during the five shifts preceding Order No. 7490599 and the fact that Miller observed rollers in contact with accumulations, I find that the manual feeder was grinding coal during the pony belt production delays over several shifts, which likely contributed to the extensive float coal dust cited in Order No. 7490599.

Despite the progressively worsening problems with the pony belt documented in the handwritten P&D reports, the pre-shift and on-shift examination reports from September 22 and September 23 make no mention of accumulations around the intersection of the Flannigan Tailgate belt and the nearby pony belt. R. Ex. 25. The only notation regarding accumulations contained in those records is from the pre-shift examination conducted from 4:00 a.m. to 8:00 a.m. on September 22nd, which states that the Flannigan Tailgate head area was "sloppy." R. Ex. 25 at 1. The pre-shift notation regarding the sloppy head area on the Flannigan Tailgate belt coincides with the 55-minute production delay because the "pony belt would not stay running," as documented in Gass's September 22 P&D report. R. Ex. 20 at 32. The following on-shift examination record indicated that the belt head area had been cleaned. R. Ex. 25 at 2. Thereafter, there are no references to accumulations near the pony belt or Flannigan Tailgate belt in the pre-shift or on-shift examination records for the final two shifts on September 22, or in the examination records from the first two shifts prior to the issuance of Order No. 7490599 on September 23. R. Ex. 25 at 2-10.

In order for the lack of notations regarding the accumulations in the September 23 pre-shift and on-shift examination records to be accurate, the accumulations must have occurred after the last examinations were conducted, i.e., between the time the examiners signed off on the examination record books and when the accumulations were discovered by inspector Miller. Respondent's examination records state that the last on-shift examination before Miller issued Order No. 7490599 was conducted by Raney over the course of eight hours from 4:00 p.m. on September 23 to 12:00 a.m. on September 24. In that on-shift examination, Raney described the Flannigan Tailgate belt area as "safe." R. Ex. 25 at 10. However, the on-shift examination records do not indicate the exact time that Raney examined the Flannigan Tailgate. Since the accumulations were discovered at 6:50 p.m. (about three hours after Raney started his on-shift examination), it is possible that Raney examined the Flannigan Tailgate after he and his crew cleaned up the accumulations and abated the violation. If such was the case, then Raney's "safe" notation would be accurate.

[17] Raney testified that the feeder has a water spray that normally keeps the coal wet as it is loaded into the feeder, moves past the choke breaker, and onto the belt. Tr. II-69. However, the spray normally operates only when the belt is "completely full of coal." If there are interruptions in the coal being fed through the feeder, the spray will turn off and on. Tr. II-69-70. Coal that is sitting on the stagnant belt may dry out if the belt is down for a long enough period of time. Tr. II-70.

The last pre-shift examination before the discovery of the accumulations was conducted from 12:00 p.m. to 4:00 p.m. R. Ex. 25 at 9. The pre-shift mine examiner signed off on the examination records at 3:47 p.m. on September 23, about three hours before Miller discovered the accumulations. *Id*. The record for that pre-shift examination makes no mention of any accumulations near the Flannigan Tailgate and pony belt intersection. In order for that examination record to be accurate, the accumulations must have occurred within the brief three-hour window between when the pre-shift examiner signed the records at 3:47 p.m. and when Miller discovered the accumulations at 6:50 p.m.

I find it unlikely that the accumulations occurred in the short, three-hour window between the last pre-shift examination and the issuance of Order No. 7490599. When asked why the examinations records might not reflect accumulations that existed at the time the examinations were conducted, inspector Miller stated that each examiner reported hazardous conditions differently, and that examiners exercise some level of discretion when conducting their examinations. Tr. I-358-59. Miller also opined that the accumulations had existed for at least two shifts. R. Ex. 25 at 1-2; Tr. I-108, 314. Miller emphasized that the loose coal accumulations were a "distinct black in color," or "jet black," rather than the "red-brown" or "shiny," "glaze[d]" color of fresh coal.[18] Tr. I-108, 314-15; P. Ex. 4 at 8. Miller also testified that there was float coal dust on top of the accumulations. He testified that as float coal dust settles on rock-dusted surfaces, those surfaces change from white, to gray, to black. Tr. I-71-72, 315. In addition, Respondent's safety director, Joseph Myers, who accompanied Miller on his inspection, testified that the conditions were "obvious," and that he was "upset at the conditions that [they] found." Myers "immediately shut down the pony belt to correct the situation" after Miller issued Order No. 7490599. Tr. II-143-44.

Based on the printed and handwritten P&D reports and the testimony of Miller, Raney, and Myers, I find that the accumulations existed for at least two shifts, and Respondent knew or should have become aware of the accumulations no later than foreman Gass's 12:00 a.m. to 8:00 a.m. shift the morning of September 23. I also conclude that Miller exercised discretion when he failed to cite Respondent for the inadequate belt examinations on September 23. As noted above, Raney admitted that the belt's intermittent starting and stopping could cause accumulations, and the section foremen (including Raney) were aware of the progressively serious pony belt delays occurring on September 22 and 23, since the shift foremen themselves were responsible for creating the handwritten P&D reports. Tr. II-461-62; *see* R. Ex. 20. As then-Chairman Jordan and Commission Nakamura noted in their dissenting opinion, "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" 38 FMSHRC at 2095 (*citing Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (quoting *Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied* 461 U.S. 928 (1983)). In addition, and apart from troubleshooting the electrical issues with the pony belt, both Gass's and Robertson's section

[18] Miller also testified that float coal dust is usually black, and that a "reddish-brown" cast to the float coal dust indicates that the dust "has been there for quite some time." Tr. I-64, 206. In contrast, newly-mined loose coal on the belt is "reddish-brown" in color or has a shiny, glazed cast to it because it has been sprayed with water as it travels through the feeder and onto the belt. Tr. I-314-15.

crews were actively mining in the Nos. 1, 2, and 3 entries on September 23, only five cross cuts inby the belt intersection where the accumulations were found. R. Ex. 20 at 37, 39. As noted in my initial Decision and Order, "given the scope of the condition cited, it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition." 35 FMSHRC at 2239.

The accumulations at issue here existed for more than two shifts. During those shifts, multiple belt examinations were conducted, and mine foreman were traveling past the accumulations with their section crews as they traveled to and from the working face. Respondent clearly had multiple opportunities to discover, document, and correct the violative conditions, but nonetheless failed to take action. I therefore conclude that the accumulations resulted from Respondent's repeated failure to make reasonable efforts to eliminate a known violation that existed for at least two shifts.

Although the Commission's majority decision declined to address whether constructive knowledge is sufficient for a flagrant designation, then-Chairman Jordan and Commissioner Nakamura found that Respondent had actual knowledge of the violation. 38 FMSHRC at 2093 (Chairman, Jordan, and Nakamura, Comm'r, concurring and dissenting). Commissioner Althen, in his dissent, thoughtfully discusses the Commission's jurisprudence regarding negligence, unwarrantable failures, and the standard of knowledge required under the plain language of section 110(b)(2). He notes the subtle difference between actual implied knowledge and constructive knowledge, and concludes that the plain language of Section 110(b) requires actual knowledge on the part of the operator:

> The notion of constructive knowledge comprehends the notion of a "legal" duty to make an inquiry. If an actor has a duty to undertake an inspection for example, the actor may have constructive knowledge of an event he should have discovered by performing his duty. In such instance, the actor "should have known" certain facts but did not know those facts because of his failure to meet a legal duty of care. . . . . The notion of implied actual knowledge, on the other hand, is a factual construct based upon information of which the actor actually was aware. Thus, if an actor performing an inspection actually detects facts (former facts) that would have led a reasonable actor to learn of a specific problem (latter facts), a court may infer actual knowledge of the latter facts due to the actor's express knowledge of the former facts.

38 FMSHRC at 2104 n.7 (Althen, Comm'r, concurring and dissenting).

While recognizing the difference between actual implied and constructive knowledge in the abstract, I note that the practical application of these definitions to the facts at issue here yields the same substantive outcome: the mine foremen knew that the pony belt delay *could* cause accumulations, and therefore had a duty to inspect and determine whether accumulations *had* occurred; or, alternatively, the mine foremen knew that the pony belt was experiencing delays, knew that the such delays might cause accumulations (former facts), and therefore a reasonable foreman would have learned of the accumulations (latter facts). Either way, the Respondent knew (had actual implied knowledge) or should have known (had constructive

knowledge) of the accumulations. Although I found in my initial Decision and Order that Respondent had constructive knowledge of the accumulations, *see* 35 FMSHRC at 2239 ("[T]he Secretary has shown that Respondent knew or should have known of the accumulation problem."), my review of the record on remand leads me to conclude that Respondent also had actual implied knowledge of the accumulations for at least two shifts.

As I have concluded as a matter of law that the violative conditions in Order No. 7490599 satisfy the requirements of the "narrow" interpretation of section 110(b)(2)'s repeated flagrant designation, I decline to address whether the violative conditions were also "flagrant" under the broad interpretation of section 110(b)(2).

C. The Violation in Order No. 7490599 was the Result of Respondent's High Negligence

In determining whether an operator meets its duty of care under the cited standard, I consider what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring the Secretary to show that the operator failed to take specific action required by the standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

In my initial Decision and Order, I found that the cited accumulations were not reported in the examination record books by the mine examiners, who are the agents charged with responsibility for identifying hazardous conditions and ensuring that they are addressed in a timely manner. Thus, the accumulations were not reported to mine management through the normal channels by which such conditions would be identified and addressed. I viewed this as a mitigating factor. Accordingly, I reduced the negligence designation from "high" to "moderate." 35 FMSHRC at 2241.

On appeal, the Commission took issue with my finding that the presence of a mitigating factor reduced the negligence, and instructed me to reevaluate the degree of negligence "from the starting point of a traditional negligence analysis." 38 FMSHRC at 2083. The Commission also pointed out that the negligence of a mine examiner is imputable to the mine operator. *Id.* Accordingly, I reevaluate Respondent's degree of negligence, taking into account the culpability of Respondent's shift examiners regarding their knowledge of the violative accumulations. 38 FMSHRC at 2083.

I also found in my initial Decision and Order that Order No. 7490599 was the result of Respondent's unwarrantable failure to comply with section 75.400. Unwarrantable failure is aggravated conduct characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." 35 FMSHRC at 2240, 2231 (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)). I found that the six-to-

fourteen-inch-deep accumulations of loose coal around the tailgate roller and the 450 feet of loose coal and float coal dust extending outby the tailgate were extensive, obvious, and dangerous. 35 FMSHRC at 2231. I noted that "the size and location of the accumulations, in addition to the fact that the area was not isolated from active workings, contributed to the likely risk of a serious and possibly fatal injury to miners working inby." 35 FMSHRC at 2238. I have credited Miller's testimony that the accumulations were present for at least two shifts. As stated in my initial Decision and Order, "given the scope of the condition cited, it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition." 35 FMSHRC at 2239. The Commission has long recognized that mine foremen, who conduct pre-shift and on-shift examinations, are agents of the mine operator. *See, e.g.*, *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463–64 (Aug. 1982) ("It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty."). In addition, I found that mine management had both actual implied knowledge and constructive knowledge of the accumulations and repeatedly failed to make reasonable efforts to eliminate them over the course of at least two shifts.

Respondent was also on notice that greater efforts were necessary in order to comply with section 75.400. I found in my initial Decision and Order that "the record establishes that Respondent was warned repeatedly through meetings, training sessions, and prior citations [and] orders[] about belt accumulation problems . . . ." 35 FMSHRC at 2237 (citing Tr. I-86-90, 123). In addition, I noted Respondent's efforts to abate belt accumulation violations:

> [A] group of MSHA employees came from Beckley, West Virginia to train Respondent's examiners; [] Respondent held special safety talks and manager meetings; [] changes were made in the work force allocation to increase belt examinations; and [] Respondent created PowerPoint training guidelines on July 7, 2007.

35 FMSHRC at 2240 (citing Tr. I-123, 448-49, 455-56; R. Ex. 16). Despite these efforts, Respondent repeatedly continued to violate section 75.400. *Id*. at 2237. Respondent violated section 75.400 approximately 162 times in the fifteen months preceding Order No. 7490599. MSHA Mine Data Retrieval System, available at https://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Mar. 6, 2017); *see also* 35 FMSHRC at 2267. Moreover, out of the 361 violations of section 75.400 that Respondent received in the twenty-four months preceding the issuance of Order No. 7490599, seventy-seven of the violations were designated as S&S, and eleven of the violations were designated as unwarrantable failures to comply with section 75.400. P. Ex. 1; *see also* 35 FMSHC at 2211.

For the reasons stated above, I find that the violation in Order No. 7490599 was the result of Respondent's high negligence.

D. Penalty Assessment

The Secretary has proposed a specially assessed penalty of $164,700 for the violation alleged in Order No. 7490599. Because the Secretary has proposed a penalty substantially higher than would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support an elevated assessment under

the rationale and facts supporting the Secretary's decision to seek a special assessment. I then assess the penalty independently in light of my findings of fact, analysis, and conclusions of law on remand about the record evidence concerning Section 110(i) criteria and the deterrent purposes of the Act.

The Secretary's narrative findings for the special assessment contain terse support for the specially-assessed proposed penalty. The Secretary states that the violation was "flagrant" and that the gravity was "serious." Narrative Findings for a Special Assessment, *Petition for the Assessment of Civil Penalties*, Docket No. LAKE 2009-0035. After my review of the record on remand, I have affirmed these findings.[19] Respondent is a large operator, and mined seven million tons of coal in 2007. MSHA Mine Data Retrieval System, available at https://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Mar. 6, 2017). The parties stipulated that the proposed special assessment will not affect Respondent's ability to stay in business. The parties made no stipulation regarding good faith abatement, but the record demonstrates that the violation was abated in good faith. *See also* 35 FMSHRC at 2267.

I have found that the violation in Order No. 7490599 was S&S, an unwarrantable failure resulting from Respondent's high negligence, and a repeated flagrant violation. In addition, as noted in my initial Decision and Order,

> [i]n the twelve months preceding the issuance of Order No. 7490599, Respondent was issued twenty-seven citations/orders for alleged violations of [section] 75.400 involving accumulations of coal, lump coal, coal dust, float coal dust, and coal fines on and around conveyor belts and belt structures in the Galatia Mine. P. Exs. 5-31. Nineteen of the aforementioned citations/orders were issued as S&S violations. P. Ex. 5, 8, 10-12, 14, 15-18, 20, 22, 25-31. In the twenty-four months preceding [Order No. 7490599], Respondent was cited for violations a total of 361 times. P. Ex. 1. Among those 361 citations and orders, seventy-seven were issued as S&S violations and eleven were issued as unwarrantable failure violations under Section 104(d) of the Mine Act. P. Ex. 1.

35 FMSHC at 2211.

Given Respondent's repeated and extensive violation history under section 75.400, it cannot be gainsaid that non-flagrant civil penalty assessments under the progressive enforcement scheme of the Mine Act, including 77 penalties for S&S violations and 11 penalties for unwarrantable failures, have not deterred Respondent from continuing to violate the cited standard. In Order No. 7490599, the Secretary demonstrated that the Respondent repeatedly failed for at least two shifts to make reasonable efforts to eliminate known accumulations which

[19] The Secretary originally designated the accumulations as contributing to a hazard that was highly likely to lead to a reasonably serious injury. P. Ex. 3. In my initial Decision and Order, I affirmed the Secretary's S&S designation for Order No. 7490599, but found that the accumulations contributed a hazard that was reasonably likely and not highly likely to lead to an injury of a reasonably serious nature. 35 FMSHRC at 2225; *see Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984). The Commission did not disturb that finding when remanding this matter.

could reasonably be expected to cause death or serious bodily injury to six miners. As Commissioners Cohen and Young recognized, "the essence of a repeated violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." 38 FMSHRC at 2087 (Cohen & Young, Comm'rs, concurring). As Commissioner Althen concluded, "the clear purpose of section 110(b)(2) is to incentivize operators strongly to eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition." 38 FMSHRC at 2110 (Althen, Comm'r, concurring and dissenting). Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, a "repeated flagrant" penalty assessment is warranted here under the Mine Act's progressive enforcement scheme. I assess a penalty of $112,380.

IV. ORDER

Order No. 7490599 is **AFFIRMED**, including the S&S, high negligence, unwarrantable failure, and flagrant designations. Respondent American Coal Company is **ORDERED** to pay a total civil penalty of $112,380 within thirty days of this Decision and Order on Remand.[20]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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/ccc

[20] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 21, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOLIDATION COAL CO. now THE OHIO COUNTY COAL CO., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2016-0123 A.C. No. 46-01436-396817 Mine: Shoemaker Mine

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The docket involves 5 (five) citations for which the Secretary has filed a motion to approve settlement ("Motion"). The originally assessed amount for the five citations was $72,500.00, and the proposed settlement is for $39,875.00. The Secretary also requests that two of the citations be modified, as described below. For the reasons which follow, the motion must be denied.

Citation No. 9083154: The Court begins with the one citation which, per the settlement, is to be paid in full and without any modifications. This involved 104(a) Citation No. 9083154, citing 30 C.F.R. §75.223(a)(1),[1] for which the negligence was marked as "high," and which was marked as "Significant and Substantial," with the gravity listed as "reasonably likely," "permanently disabling," with one person affected. The issuing inspector described the following condition or practice:

> The mine operator failed to propose revisions of the roof control plan. Mine conditions indicate the currently approved roof control plan is not suitable to control the mine ribs. The consistency of the rock binder has changed since the roof control plan was approved. The binder ranges between 5 and 18 inches in thickness. *The binder begins to deteriorate in 2-3 shifts after an area has been mined* allowing large pieces of coal/rock to fall out above and below the binder. The binder has also fallen out in large pieces. *Numerous citations for failure to adequately support the ribs have been issued to the mine operator. Additionally, the mine operator has been placed on notice that the existing roof control plan is*

[1] 30 C.F.R. § 75.223, titled, "Evaluation and revision of roof control plan," provides at subsection (a)(1), "Revisions of the roof control plan shall be proposed by the operator - (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts." 30 C.F.R. § 75.223.

> *not adequate to address current mining conditions on June 11, 2015 and July 6, 2015. Mine management recognizes the adverse conditions as evidenced by an internal written standard operating procedure (email) mandating the installation of rib support. However, based on the observation of mining conditions, the installation of rib supports has been sporadic and intermittent, and miners continue to be exposed to the hazard of inadequately supported ribs*.

Citation No. 9083154 (emphasis added).[2]

It is against this backdrop that the Secretary presented the following bases for the proposed reductions and modifications of the four other citations in this case. The reader should be mindful that when presenting his rationale for these significant reductions, about half (i.e. 50%) of *each* rationale offered by the Secretary repeats essentially the same mantra, that "[i]n consideration of this evidence, which slightly mitigates the negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty." Motion at 3.

For Citation No. 9083151, involving a 104(a) citation, invoking § 75.202(a) (failure to adequately control rib), and which was marked as S&S, Reasonably Likely, Permanently Disabling, with 1 Affected, Moderate Negligence, and with a proposed penalty of $11,500.00, the settlement amount is $6,513.00, representing a 43% reduction in the penalty.

The Citation identified 8 (eight) areas where

> [t]he mine ribs where persons work or travel are not being adequately controlled to protect persons from falling coal and rock on the 4 West TG Section in the following locations: 1) 4 WEST TG Track switch on left rib measuring 53" wide by 70" high and 8" thick [;] 2) 8S2-29 wall, #4-5 crosscut right rib measuring 24"

[2] Further evidencing the seriousness of this citation invoking 30 C.F.R. §75.223(a)(1), five "subsequent actions," dated August 28, 2015 through September 4, 2015, informed: "Extended to allow time for a geologist from Murray Energy and MSHA to determine the appropriate method to support mine ribs and submit a revised roof control plan. As part of this extension the operator agreed to conduct a safety meeting with all employees before going underground on heightened rib awareness to support and scale ribs down where men are required to work or travel." Subsequent Action August 27, 2015. Following that, the next continuation data for the citation informed that, "[t]he operator has submitted an action plan which will take effect until a revision can be made to the approved roof control plan. The action plan will place an additional certified foreman on each producing section to monitor rib conditions in all entries and scale down as needed. The results of all scaled ribs will be recorded in the section examination book." Subsequent Action August 28, 2015. Another Subsequent Action/ Continuation Data noted progress in the revision of the roof control plan, while remarking that the August 28, 2015 action plan remained in place until such plan was approved. Subsequent Action, August 31, 2015. This process continued, as reflected in Subsequent Action dated September 1, 2015, with the same proviso that the August 28, 2015 action plan remained in effect until a revised roof control plan was approved. Three days later, the revised plan was approved. Subsequent Action September 4, 2015.

> wide by 32" high by 7 " [;] 3) 8S2-28 wall, #5-6 crosscut right rib measuring 18' long by 3-5' high and 6 " thick [;] 4) 8S2-28 wall, #7-8 crosscut, left inby corner measuring 45 " wide by 58 " high by 8" thick and 2 ' wide by 4 ' high and 8" thick. [;] 5) 4 WEST TG #5 entry inby #8 entry of the Mains measuring 24" wide by 5 ' high and 5" thick [;] 6) 4 West TG #4 entry just inby 0 + 08 on left rib measuring 8 ' long 5 ' high by 8" thick [;] 7) 4 West TG # 2 entry just inby 0 +08 right rib measuring 3' long by 4' high and 7" thick [;] 8) 4 West TG # 1 entry just outby 0 + 08 right rib measuring 5 ' long by 4 ' high and 6 inches thick and left rib measuring 5 ' long by 2 ' wide and 6" thick.

Citation No. 9083151.

Notably, the Citation then added, "Standard 75.202(a) [the standard violated] was cited 90 [ninety] times in two years at mine 4601436 (90 to the operator, 0 to a contractor.)" *Id*.

Employing an economy of words, a trait this Court has noted before in the Secretary's settlement motions, the rationale states, in full,

> [t]hough there was visible deterioration to the ribs, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.

Motion at 3.

Thus, though providing no details, and informing only that the "Respondent presented evidence that this condition did not exist for an extended period of time," (though the eight areas are described singularly as a "condition," not conditions,) the Secretary's rationale must necessarily suggest that *all* eight areas did not exist for an "extended" period of time, a decidedly unusual situation.

Further, what the Secretary means by an "extended period" is not amplified. Beyond that is the more fundamental issue of whether the Secretary's declaring that *the Respondent presented evidence* that this condition did not exist for an extended period of time is sufficient. This is because telling the Commission that *the Respondent presented evidence* is simply an uninformative declaration, as contrasted with the presentation of facts, disputed or agreed upon. If such a declaration suffices, and the Commission is presented with nothing more, then the Secretary will have, as a practical matter, succeeded with his original stance in settlement submissions, that he need not provide the Commission with any real information. Such an outcome would be essentially no different, substantively, than his repeated expression that "[i]n

consideration of this *evidence*,[3] which slightly mitigates negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty." Motion at 3 (emphasis added).

For Citation No. 9083289, involving a 104(a) citation, which also invoked § 75.202(a) (another failure to adequately control ribs), and which was also marked as S&S, and Reasonably Likely, but "Fatal," instead of Permanently Disabling, and again with 1 Affected, Moderate Negligence, and with a proposed penalty of $12,900.00, a 75% reduction was presented, the settlement amount being $3,225.00. To justify this very large reduction, the Secretary advised that the "Respondent presented evidence that, based on their size, consistency, and location, the cited ribs would not have caused fatal injuries." Motion at 3. For the expectation of a "*permanently disabling*" injury which, though not fatal, at least to the Court does not seem to be a trifling injury, and for no other basis, the Secretary seeks the 75% penalty reduction.

By the Court's reading of the Citation which, under the settlement, is not challenged, except as to the fatal versus permanently disabling injury issue, the areas cited seem extensive. The citation declared,

> [t]he operator failed to adequately support or otherwise control the ribs in the # 2 entry (track) of 2- East. Hazardous rib conditions were observed in the following locations gapped/separated and were easily pried down: – Between 71 and 72 block on the belt side rib, the loose rib measured 10.5 feet long, up to 3 feet wide, and 8 inches thick. The binder in this area measured 2 feet thick[.] Between 76 and 77 block on the belt side rib, the loose rib measured 8 feet long, 6 feet wide, and 4 inches thick. The binder in this area measured 2 inches thick. This is a highly traveled area as miners walk past these conditions to get from the end of the track to the longwall face. Some areas on this section have been rib bolted and some areas have not been. The areas that are rib bolted do not slough and fall out in big pieces like the areas that have not been supported. The cited location[s] were along a rib line that was not supported. Standard 75.202(a) was cited 83 times in two years at mine 4601436 (83 to the operator, 0 to a contractor.

Citation No. 9083289.

The rationale provides no information as to the basis for the claim that the "size, consistency and location" of the cited ribs would not cause a fatal injury but the settlement concedes that a *permanently disabling* injury would occur and that it was reasonably likely to

[3] To be clear, the Court does not consider an unadorned assertion that the "*Respondent presented evidence* that this condition did not exist for an extended period of time," standing alone, as useful information. In numerous settlement motions before this Court the Secretary has provided more information, at least as asserted from the perspective of a Respondent, to support a proposed penalty reduction based on the contention that a condition had not existed for long. In such cases, typically the settlement motion would then acknowledge that, in light of the particular facts asserted by the Respondent, those asserted facts present legitimate questions of fact which could only be resolved by way of a hearing.

result. Motion at 3. Nor does the Secretary concede, in any manner, that the size, consistency and location claim creates legitimate factual disputes which could only be resolved through a hearing. The citation, it should be recalled, referred to "big pieces" and noted that it was "a highly traveled area." Citation No. 9083289.

For Citation No. 9083153, involving a 104(a) citation, which again invoked § 75.202(a) (another failure to adequately control rib), and which was also marked as S&S, and Reasonably Likely, Permanently Disabling, and again with 1 Affected, Moderate Negligence, and with a proposed penalty of $11,500.00, a 43% reduction reappears, with the settlement amount being $6,513.00. To justify this very large reduction, the Secretary advised, in a reprise of its justification for Citation No. 9083151, that the "[t]hough the cited condition was in a traveled area, Respondent presented evidence that this condition did not exist for an extended period of time." Motion at 3.

The Citation stated that "[t]he mine ribs where persons work or travel are not being adequately controlled to protect persons from falling coal and rock on the 8 South Mains track entry left rib from 8S2-49 to 8S3-01 a piece of rib was scaled down with little to no effort measuring 12' long by 5' high and 9" thick." Citation No. 9083153.

The Secretary's rationale for the 43% reduction provides in its entirety,

> Though the cited condition was in a traveled area, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates the negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.

Motion at 3.

It should be recognized that, reduced to its essence, the rationale offers 15 (fifteen) words: "Respondent presented evidence that this condition did not exist for an extended period of time." *Id*.

Accordingly, the Court notes the same deficiencies for Citation No. 9083153 as it highlighted for Citation No. 9083151. If section 110(k) is to be meaningful, it is patently insufficient for the Secretary to merely state that the Respondent presented evidence that this condition did not exist for an extended period of time. Some basis for the Respondent's claim must accompany such an assertion.

For Citation No. 9083292, once again involving a 104(a) citation, and which also invoked § 75.202(a) (another failure to adequately control rib), and which was also marked as S&S, Reasonably Likely, and "Fatal," with 1 Affected, Moderate Negligence, and with a proposed penalty of $17,300.00, a 75% reduction was presented, the settlement amount being $4,324.00. To justify this very large reduction, the Secretary advised that the

> Respondent presented evidence that, based on its size and consistency, the cited rib would not have caused fatal injuries. Respondent also presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence and the risk inherent in proceeding to a hearing, the Secretary agreed to modify the type of injury and reduce the penalty.

Motion at 4.

The citation asserted that,

> [t]he operator failed to adequately support or otherwise control the ribs in the belt entry of the 2-East Longwall. Between 77 and 76 block, a piece of rib is gapped/separated and *was easily pried down* on the walk side of the belt. The void in the rib after the area was scaled down measured 4 feet long, up to 3 feet wide, and up to 8 inches thick. The loose rib was at the top portion of the rib line. *The bottom half of the rib had already had already sloughed and fallen out prior to the condition being found. A miner was working beside the belt with his back to the rib when the condition was found.* No rib bolts were installed in this area. Standard 75.202(a) was cited 93 times in two years at mine 4601436 (93 to the operator, 0 to a contractor).

Citation No. 9083292 (emphasis added).

Again, in what the Court considers a jaw-dropping justification for a 75% reduction, the settlement rests on the idea that a merely permanently disabling injury warrants such a reduction. Notably, the Secretary dropped the "size, consistency, and location" description utilized in Citation No. 9083289 (uninformative as it is), leaving "size and consistency," without including "location," in support of the reduction. Motion at 3-4. This was not surprising, given that the citation noted that "[a] miner was working beside the belt with his back to the rib when the condition was found [and that] [n]o rib bolts were installed in this area." Citation No. 9083292. As he did for Citation Nos. 9083151 and 9083153, the Secretary again asserted the unilluminating claim that the "Respondent also *presented evidence* that this condition did not exist for an extended period of time," but without any information about the nature of that evidence. Motion at 4 (emphasis added).

When the above-articulated deficiencies in these rationales are considered in the context of the one matter that was entirely conceded in the settlement, Citation No. 9083154, it strikes the Court that the enormous penalty reductions for the other citations are unexplained anomalies. Given the fully admitted conditions identified in Citation No. 9083154, and the concession that the proposed penalty for that citation should remain intact, the other citations require substantial

justification to support reductions of this order.[4] After all, that fully-admitted violation, Citation No. 9083154, describes a rib stability issue of long and known duration, with numerous citations for failure to adequately support the ribs issued to the operator.

As noted at the outset of this decision, that citation informs,

> the mine operator has been placed on notice that the existing roof control plan is not adequate to address current mining conditions on June 11, 2015 and July 6, 2015. Mine management recognizes the adverse conditions as evidenced by an internal written standard operating procedure (email) mandating the installation of rib support. However, based on the observation of mining conditions, the installation of rib supports has been sporadic and intermittent, and miners continue to be exposed to the hazard of inadequately supported ribs.

Citation No. 9083154.

Accordingly, based on the foregoing reasons, and because merely asserting that a respondent has "presented evidence," is insufficient, the Secretary's Motion for Decision and Order Approving Settlement, being inadequate under Section 110(k), is **DENIED**. This case is now to be set for a prompt hearing.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[4] As noted, each of these involved 30 C.F.R. §75.202(a) violations. Three of these were found on August 26, 2015, (Citation Nos. 9083151, 9083289, and 9083153, at 5:05 p.m., 5:25 p.m., and 9:00 p.m., respectively.) Thus, the three citations found on August 26, 2015 precipitated the issuance of Citation No. 9083154, as reflected by that citation's issuance at the end of that day. The fourth § 75.202(a) violation, Citation No. 9083292, was issued two days later, on August 28, 2015.

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June 30, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2014-816 A.C. No. 36-07230-346706 Mine: Bailey Mine

DECISION AND ORDER

Appearances: Jennifer Gold, Esq., Office of the Solicitor, U.S. Department of Labor, Representing the Petitioner

James P. McHugh, Hardy Pence, PLLC, Representing the Respondent

Before: Judge Lewis

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(d). On May 29, 2014, the Secretary filed an Assessment of a Civil Penalty for Citation No. 7076747 for an alleged violation of 30 C.F.R. § 50.10(b) to Consol Pennsylvania Coal Company, LLC ("Respondent") at Bailey Mine. On July 2, 2014, Respondent filed an answer contesting Citation No. 7076747 and the negligence findings. This case was assigned to the undersigned on April 28, 2016. On December 13, 2016, a hearing was scheduled to take place on March 8, 2017, in Pittsburgh, PA. The parties presented testimony and documentary evidence, filed post-hearing briefs, and reply briefs.

II. Joint Stipulations[1]

The parties have stipulated to the following facts:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. §§ 802(d) and 803, at the mine at which the Citation(s)/Order(s) at issue in this proceeding were issued.

2. Operations of the Respondent at the mine at which the Citation(s)/Order(s) were issued are subject to the jurisdiction of the Mine Act.

3. Bailey Mine is operated by the Respondent.

4. Payment of the total proposed penalty of $5,000.00 in this matter will not affect the Respondent's ability to continue in business.

5. The individual whose name appears in Block 22 of the Citation(s)/Order(s) in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citation(s)/Order(s) were issued.

6. The Citation contained in Docket No. PENN 2014-816 was issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the Citations, as required by the Act.

7. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2014-816 contains true and authentic copies of Citation No. 7076747 with all modifications or abatements, if any.

8. The R-17 Certified Assessed Violation History Report is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

(JX-1).

[1] The Joint Stipulations were submitted at hearing as Joint Exhibit 1 (JX-1). Each stipulation will hereinafter be cited to as J.S. followed by the stipulation number. The Secretary's exhibits will be cited to as GX followed by its number and Respondent's exhibits will be cited to as RX followed by its number.

III. Summary of Testimony

Thomas Bochna

Thomas Bochna investigated the accident at issue on August 12, 2013.[2] (Tr. 38).[3] Bochna had first learned of the Bailey Mine accident at issue here on August 12, 2013, shortly after he arrived for work at 5:30 a.m. (Tr. 38). He had inspected Respondent's mine "many times" in the past. (Tr. 43).

On August 12, 2013, Bochna had reduced to writing the initial 103(j) order to a 103(k) order which was terminated that day. (Tr. 45-48; GX-2). Bochna had initially interviewed witnesses at Bailey Mine on the day of the accident, later interviewing the victim, Robert Stern, at Health South Rehab facility. (Tr. 49). As a result of his investigation, Bochna eventually issued his 104(a) citation, Citation No. 7076747, on September 23, 2013. (GX-1).

According to the *MSHA Escalation Report*, GX-3, Respondent's safety supervisor at Bailey Mine, Michael Tennant, first notified MSHA of the accident at 5:09 a.m. (and 55 seconds). (Tr. 51). Bochna's investigation had established that the accident had taken place at around 3:15 a.m. (Tr. 52). Bochna did not know why the escalation report had given 4:45 a.m. as the accident time. (Tr. 52).

Respondent had indicated according to the report that the "types of injuries" sustained were "unknown." (Tr. 53; GX-3).

In his preliminary report of the accident, GX-1, Bochna described the accident as a GMS Repair Employee being injured when he became caught between the bucket of a battery scoop and a supply car. (Tr. 56). Referring to his Accident Investigation-Data Report, Bochna found the "root cause" of the accident to be the employee positioning himself in a "pinch point red zone area" between the scoop bucket and the rail car. (Tr. 57; GX-1).

After conducting both individual and ground interviews at Bailey Mine, Bochna ended his questioning at 10:25 a.m. (Tr. 62-63). He learned that the accident had come about because Mr. Stern had entered the area between the scoop and the end of the rail car to determine why the scoop was stuck. (Tr. 66-67). Due to some slack in a safety chain and drifting forward of a rail car, Stern became crushed between the scoop and the end of the rail car. (Tr. 68-71). Both the scoop and rail car were large objects weighing 5-10 tons. (Tr. 69).

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[2] He had worked as a supervisory coal health and safety inspector for three years, first beginning work as a regular coal health inspector in 2008. (Tr. 36). His coal mine inspector duties involved conducting E01 and spot inspections, issuing citations, and performing accident investigations. (Tr. 37). Prior to joining MSHA, Bochna had worked for 30 years as a coal miner. (Tr. 37). His positions included continuous miner operator and fire boss. (Tr. 37). Possessing a 2-year degree from Penn State in mine engineering, Bochna had a total of 39 years of experience in coal mining. (Tr. 36-37).

[3] References to the hearing transcript will be cited as Tr. followed by the page number.

Bochna reviewed his inspection notes at hearing. He had interviewed Daniel Greathouse, who operated the scoop when the accident had taken place and who had participated in a re-creation of the accident. (Tr. 77, 82). Greathouse reported that Stern stated that it felt like his "guts were coming out of his penis." (Tr. 83).

Bochna also interviewed two GMS "red hats," Travis Barber and Garret Scales, who were working with Stern at the time of the accident. (Tr. 78-80). Although neither Barber nor Scales had actually witnessed the accident take place, they heard and saw Stern immediately thereafter. (Tr. 79). Both Barber and Scales recalled Stern stating that he was hurt "real bad," was in some pain, and felt like something was coming out of his penis. (Tr. 81).

Travis Stillwell was also interviewed. (Tr. 84). Stillwell was at the scene at the time of the accident and heard Greathouse say, "scoop stuck" and then Stern say, "help me." (Tr. 85). When Stillwell approached Stern—the victim was laying on the ground, complaining that his stomach hurt and that he could not feel his legs. (Tr. 85).

Bochna also reviewed his interview of John McDonald, section foreman at Bailey Mine. (Tr. 85). McDonald had been notified about the accident at approximately 3:25 a.m. (Tr. 86). He issued instructions to Colby Watson to bring a gurney and EMT kits to the accident site. (Tr. 85). McDonald had called the bunker, stating that a Life Flight would be needed. (Tr. 86). Life Flight was a helicopter brought in when there was a serious injury and speedy transportation to a hospital was necessary. (Tr. 86). McDonald noticed that Stern was experiencing stomach swelling and was in extreme pain. (Tr. 86).

Bochna had also interviewed Shannon Smith, an EMT, who gave treatment to Stern at the scene. (Tr. 86). Smith found Watson, Greathouse, and McDonald attempting to put Stern on a backboard. (Tr. 87). Stern's head was being held up because no neck brace was available. (Tr. 87). His visible injuries included abrasions on the right side around the waist area, a little (amount of) blood on the right hip area, and bruising around the hip area. (Tr. 87). Stern could not move his left leg and had no feeling in his right leg. (Tr. 87). No oxygen was available at the scene and was only given by EMS when Stern was transported to the surface on a mantrip. (Tr. 87, 88).

Smith related that Stern had never lost consciousness. (Tr. 88). Smith spoke with Stern on the mantrip all the way to the surface. (Tr. 88). Haulage had been cleared all the way out.[4] (Tr. 88).

Bochna interviewed Stern at a rehab facility on September 4, 2013. (Tr. 89). Stern had a plate inserted into his hip area. (Tr. 89). Bochna's review of hospital records disclosed that after Stern's internal bleeding had stopped, surgery on the pelvis was performed on August 12, 2013. (Tr. 90). Stern was reported to have a crushing injury to his spine/pelvis. (Tr. 90).

[4] There was a call on the mine radio to signal that all equipment traffic should be stopped so as to make way for Stern's mantrip transport to the surface. (Tr. 88).

Bochna had also spoken with Roy Cumberledge, coordinator for GMS at Enlow and Bailey Mines, who had been at the hospital when Stern had been admitted. (Tr. 91). Cumberledge had been unable to view the injuries well, except for an abrasion on Stern's right hip. (Tr. 91). The doctor at the hospital predicted Stern's bleeding would stop in one to one and a half hours, which it did, without the necessity for surgery to prevent further bleeding. (Tr. 91). Surgery on the pelvis was performed at around 1:00 p.m. (Tr. 91).

Documentary Evidence Regarding the Nature of the Accident

At hearing, the Secretary offered into evidence GX-12A, *MSHA's Accident Prevention Program Safety Idea, Proper Blocking*, in order to establish that failing to block against hazardous motion was one of the most frequently cited regulations when investigating serious accidents and fatalities. [5] (Tr. 95).

The Secretary also introduced into evidence, *MSHA's Accident Prevention Program Safety Idea: Blocking against Motion*. (GX-12B). This document disclosed that "in the past years, seven miners died…[because] safety props [were] not available and block was either not used or ineffective." (Tr. 102). This exhibit also reported the case of a miner who was crushed between the bucket lift arms and front-end loading frame because the loader was not effectively secured from movement. (Tr. 102-03)[6].

Another *MSHA Accident Prevention Program Safety Idea, Stay Seen - Stay Alive* was offered by the Secretary. (GX-12C). In this report, MSHA announced that during the period spanning January 2000-July 2011, there had been 76 fatalities due to miners being struck by surface and underground equipment. [7] (Tr. 103).

The Secretary also offered an *MSHA Accident Prevention Program/Miner's Tip*—work experience around machinery. (GX-12E). This Bulletin, dated April 30, 2002, included the

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[5] Over objections of Respondent, this Court allowed the admission of said document and similar documents as being relevant evidence regarding the "nature of the accident." As discussed *intra* this Court holds that the proper test for determining a violation of §50.10(b) is whether, considering the totality of the circumstances, *including the nature of the accident*, an operator knew or should have known that the injury/injuries sustained by the miner had a reasonable potential to cause death. This Court specifically rejects any argument advanced by Respondent that this test is limited to assessing signs and symptoms associated with the miner's injury. (*See also* Parties' arguments regarding such at Tr. 94-100).

[6] For the same reasons above referenced, this Court also allowed admission of such, over objection, into the record.

[7] Given that Stern also had been struck/crushed between large pieces of equipment, this Court once again, over objections of Respondent, allowed this exhibit's admission. This Court, as noted *intra*, found such evidence relevant in considering the "nature of the accident" vis-à-vis the reasonable potential for fatal injury and Respondent's at least constructive knowledge of its duty to immediately notify MSHA under such circumstances.

specific advice: "Do not get between two pieces of mobile equipment. They could crush you." (Tr. 105).

Also admitted into evidence, over objection of Respondent[8], were a series of fatalgrams, all of which involved miners being killed when pinned or crushed between heavy machinery and a coal rib. (GX-13B, 13C).

Based *inter alia* upon Bochna's interviews with Bailey Mine, Consol Corporate, and GMS personnel, his personal investigation of the accident, Stern's complaints voiced at the scene, the observations of Stern by on-the-scene witnesses, the calls to clear haulage and for a Life Flight, and the treatment rendered, Bochna concluded that Respondent had violated §50.10(b). (Tr. 111-12).

Cross Examination of Bochna

On cross examination, Bochna was asked to explain why it had taken 43 days for him to conclude that Respondent had failed to call MSHA within 15 minutes of learning of the accident. (Tr. 114). Bochna explained that it had taken this period to fully complete his investigation. (Tr. 115). He had conducted ten or more accident investigations in the past. (Tr. 115).

As far as Stern's injuries were concerned, Bochna did not know what was actually told to John McDonald by the "red hats." (Tr. 118). Neither did Bochna know what Greathouse, Stillwell, or Tennant had actually relayed to McDonald. (Tr. 119).

Bochna had not spoken to EMS personnel regarding Stern's injuries. (Tr. 120). He had been informed that a doctor at the hospital had opined that Stern's bleeding would "stop on its own." (Tr. 121). Bochna did not know the circumstances under which Respondent might call for Life Flight. (Tr. 122).

During his interview of John McDonald, Bochna was informed that subsequent to the accident Stern had not lost consciousness, was speaking, and was answering questions. (Tr. 123-24). Bochna had been further informed that no CPR was given. (Tr. 124). Bochna had never asked McDonald if McDonald thought Stern's injuries had a reasonable potential to cause death. (Tr. 125). Nor did he pose this question to anyone else. (Tr. 125). Bochna had not called any medical professional at the hospital to determine whether there was any surgery for internal bleeding. (Tr. 128).

Bochna acknowledged that he had commended Respondent for its speedy treatment of Stern. (Tr. 131).

Given that the accident involved two very heavy pieces of equipment crushing an individual, the victim's stomach distention and inability to move his legs, Bochna reiterated that

[8] As in the foregoing instances, this Court allowed the admission of the fatalgrams to establish that Respondent had been put on notice of the potentially fatal nature of crush injuries.

Respondent should have been "pretty quickly" aware that Stern's injuries required immediate MSHA notification. (Tr. 133).

Shannon Smith

At hearing, Shannon Smith, the fire boss mine examiner at Bailey Mine, testified that he had worked in such position since 2009.[9] (Tr. 163-64). Smith had first learned via a radio call at Bailey Mine that "there was a man crushed." (Tr. 165). Together with a fellow fire boss, Donald Wolf, Smith arrived at the accident site within 12 minutes of the call. (Tr. 166). When he first arrived upon the scene, Smith found John McDonald, Danny Greathouse, and some contractors. (Tr. 167). Stern was lying on his side. (Tr. 169). He had a bend to his knee—"like his leg's broken." (Tr. 170). Stern complained of being in pain. (Tr. 171). He was unable to move one of his legs. (Tr. 171). Don Wolf applied a "C spine," which holds the neck straight. (Tr. 171). Stern's stomach "felt like it was getting hard," and it was distended. (Tr. 172). Smith acknowledged that this could be a sign of internal bleeding. (Tr. 172). There was a "little dab" of blood on his leg. (Tr. 173).

Stern further complained that he felt like something was coming out of his penis. (Tr. 173). Upon examining Stern, Smith, however, did not see "anything coming out." (Tr. 173).

Stern further asked Smith that if something happened to him, to tell Stern's wife and family that he loved them. (Tr. 174).

Smith characterized Stern's injury as "pretty bad" and traumatic, Stern's accident being the worst he had ever been involved with. (Tr. 174).

Smith himself had never called for Life Flight, nor has Life Flight been called since the accident at issue. (Tr. 175). However, Smith had heard that it had been called in the past. (Tr. 175).

Smith had not administered oxygen—because none was available at the scene, and Smith did not want to stop as he wanted to get Stern outside as quickly as possible. (Tr. 176-77). Smith did not take Stern's blood pressure because he did not have a cuff with him. (Tr. 177).

Smith called the bunker in order to have Life Flight contacted. (Tr. 179). In calling for Life Flight, Smith "wanted to err on the side of caution" because Stern might have possible internal bleeding that could lead to death. (Tr. 180).

[9] Smith was also a licensed and certified EMT. (Tr. 164). He had previously worked in mining as a bolter operator and bolter helper. (Tr. 165).

Cross Examination of Smith

On Cross Examination, Smith said he had utilized an assessment phase called DCABPTLS[10] in examining Stern. (Tr. 183). Once he had gone through the assessment, Smith knew he "had to get him (Stern) out of the mine…fairly quickly." (Tr. 183).

Stern did not lose consciousness at the scene and was able to understand questions. (Tr. 184). He did not have any problems with his pulse. (Tr. 184). There was a "bruising-type thing" across Stern's belly[11]. (Tr.185). There was no evidence of head injury. (Tr. 186). Stern was able to answer "sample questions." (Tr. 187). Smith noted no change in Stern's condition when he was handed-off to the paramedics. (Tr. 188).

John Henry McDonald, Jr.

John McDonald, Jr., a section supervisor at Bailey Mine since 2007 appeared and testified at hearing.[12] (Tr. 192-93). McDonald first learned of Stern's accident from Stern's fellow GMS worker, Garret Scales. (Tr. 194). It was approximately quarter after 3:00 a.m. when McDonald was first contacted. (Tr. 195). He was approximately 900 feet from Stern's accident site. (Tr. 195). Three to four minutes elapsed before McDonald arrived at the scene. (Tr. 195). McDonald found Stern lying on his side, saying he had gotten "pinched" and was in a lot of pain. (Tr. 196). McDonald called the bunker to contact 9-1-1 to get an ambulance. (Tr. 196). McDonald called MSHA with the same bell phone[13] that he had used to call the bunker. (Tr. 196).

McDonald had called Shannon Smith on the radio to come to the scene. (Tr. 198). All McDonald understood as to the nature of the accident was that Stern "got pinched between the scoop and the [rail] car." (Tr. 200). Initially, McDonald thought Stern had sustained a femur injury; but after talking to Stern, Smith thought it was higher up in the hip area. (Tr. 201).

McDonald had noticed "a lump" in Stern's stomach and felt "hardness" on his stomach. (Tr. 201). Colby Watson had accompanied McDonald to the scene and had been instructed by McDonald to get a gurney and EMT kits. (Tr. 202).

Daniel Greathouse had informed McDonald that he had backed the scoop up in order to let Stern free. (Tr. 202). Stern was unable to move his legs and could only feel a pinch in one of

[10] This acronym stands for: deformities, contusions, abrasions, punctures, bruising/burns, tenderness, lacerations, and swelling.

[11] In pointing to where the bruising was located on Stern's body, Smith placed his hand a little above his belt. (*See also* Tr. 185-86).

[12] McDonald had also worked at Bailey Mine as a foreman trainee. (Tr. 193). He had received an associate degree in mining technology at Penn State University. (Tr. 193). McDonald had at least 15 years of total mining experience. (Tr. 194).

[13] Bell phones can be used to call outside lines. (Tr. 196).

his legs. (Tr. 203). When Stern's legs were moved, he screamed in extreme pain. (Tr. 203). McDonald had requested haulage be cleared for Stern's exit.[14] (Tr. 204). It took approximately 40 minutes for Stern to be taken out. (Tr. 204). Once Stern was placed in the ambulance, McDonald did not know where Stern was headed. (Tr. 204).

McDonald testified he was familiar with a document entitled *Immediately Reportable Accident* as contained in GX-8. (Tr. 206-07). This document was posted on the bulletin board in the shift foreman's office and on bulletin boards around Bailey Mine. (Tr. 207). This document had at one time also been in McDonald's locker. (Tr. 206).

McDonald testified that during his years at Consol, he had never been given specific instruction as to how to interpret the reportable event: "an injury to an individual at a mine which has a reasonable potential to cause death." (Tr. 208; GX-8). McDonald was acquainted with GX-7—a Bailey Mine document entitled *Reportable Incident Guidelines*. (Tr. 209). McDonald also acknowledged that GX-10 was a Consol Energy safety presentation regarding "Pinch Points/Red Zones" that described the Bailey Mine Incident at issue as being one which "had a high potential for a fatal accident." (Tr. 213).

GX-9 contained another Consol Energy safety talk entitled "proper blocking," dated June 20, 2011. (Tr. 2014-15). McDonald agreed with the first sentence of the presentation, which read: "one of the most frequently cited regulations when serious accidents and fatalities are investigated is the failure to block equipment against motion." (Tr. 215).

McDonald was an unlicensed EMT at the time of the instant accident. (Tr. 217). McDonald had called the bunker to contact an ambulance. (Tr. 219). It had taken Shannon Smith 8 to 10 minutes to arrive at the accident site. (Tr. 218). Stern was on the ground, was in pain, and could not move his leg. (Tr. 218). He could speak and answer questions intelligibly. (Tr. 219). He did not exhibit any breathing problems. (Tr. 219). He did not appear to a have head injury or to be in shock. (Tr. 220). McDonald could not detect any deterioration in Stern's condition from when he first observed Stern until Stern was handed off to the EMTs. (Tr. 220).

Based upon his observations of Stern, McDonald had concluded that his injuries did not have a reasonable potential to cause death. (Tr. 222). McDonald did not have specific responsible person training as to immediate reportable accidents. (Tr. 224; *See also* GX-8). But he had participated in a group presentation when he had received his foreman papers. (Tr. 224). Red zone training was given because of all the tight areas and mobile equipment at Bailey Mine, red zone violations being particularly dangerous. (Tr. 224).

[14] Haulage was cleared anytime someone became sick or needed to leave the mine. (Tr. 222).

On redirect examination[15] McDonald stated that Life Flight had been called for on the ride out "for precaution" because "when we felt his stomach, we got nervous." (Tr. 225). Testifying that he and Shannon Smith tried to hide their conversation about Stern's stomach hardening from Stern, McDonald explained that stomach swelling could indicate internal bleeding and internal bleeding had a reasonable potential to cause death. (Tr. 225).

Michael Tennant

Michael Tennant had been safety supervisor at Bailey Mine since September 2008.[16] (Tr. 231). Tennant had first learned of Stern's accident when he had been called by Eric Cecil from the bunker at approximately 3:30-3:45 a.m. (Tr. 233). Tennant had been advised that Stern "was pinched between two cars and EMTs were on their way." (Tr. 233). Tennant was at his home at the time, and during his drive to the mine, he received a second call in which he was informed that Life Flight had been called. (Tr. 234). Stern's injuries were described as involving "a broken leg, dislocated hip or some lower-type pelvis-type incident…" (Tr. 234). Stern was reported to be conscious and alert. (Tr. 234). Tennant did not make any calls from his car regarding the accident but did initially call from his home, notifying his supervisor, Eric Shuble, who was the general superintendent. (Tr. 235).

Tennant reported initially to Steve Apperson, manager of safety. (Tr. 235-36). Apperson would report to Chuck Shaynak, who was vice president of Consol's Pennsylvania operations. (Tr. 236).

Tennant arrived at the mine at about 4:50 a.m., approximately one hour after the bunker person's original call. (Tr. 237). Stern was already gone. (Tr. 245). Tennant did not call Steve Apperson or anybody from GMS. (Tr. 238). He eventually called MSHA at around 5:09 a.m. (Tr. 239). Tennant had received a call from Randy Cumberledge, a GMS coordinator, to update Tennant on Stern's condition. (Tr. 219). Stern was reported to have a broken pelvis and internal bleeding. (Tr. 239).

Tennant did not go to Bailey Mine every time that there was an accident but had chosen to go to Bailey Mine because Stern had been pinched between two large pieces of equipment. (Tr. 243). Tennant did not know why the MSHA Escalation Report gave 4:45 a.m. as the time of the accident. (Tr. 243; GX-3).

Tennant testified that, subsequent to mine accidents, safety talks as contained in GX-10 were generally given as soon as possible. (Tr. 246). Tennant agreed with the final sentence under Pinch Points/ Red Zones, which read: "This had a high potential for a fatal accident." (Tr. 247).

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[15] As discussed *infra* McDonald's statements on redirect examination essentially contradict Respondent's argument that Stern's injuries did not appear to have a reasonable potential for death.

[16] From 2001 to 2008, he had been a safety inspector at the mine. (Tr. 231). Tennant possessed a bachelor's degree in safety engineering and had an assistant mine foreman certification. (Tr. 232).

Tennant further agreed that, as outlined in *Bailey Mines/ Reportable Incident Guidelines* bulletin, he was to be immediately notified following any agency notification of an injury, which had the reasonable potential to cause death. (Tr. 251; GX-7). Tennant also confirmed that a Consol Energy safety talk on "proper blocking," dated June 20, 2011, indicated that the failure to block equipment against motion was one of the most frequently cited regulations when serious accidents and fatalities are investigated. (Tr. 253; GX-9).

According to Consol documents, the Bailey Mine incident[17] at issue was reported to have fatal potential of "5" and the "high probability to cause death." (Tr. 262-67; *See also* GX-14).

Based upon the information given to him by Cecil over the phone—that there was something wrong about Stern's leg or pelvis, that Stern might have a dislocated hip or broken leg, but that he was conscious and alert—Tennant did not believe that any of Stern's injuries posed a reasonable potential to cause death. (Tr. 269-70). Tennant received basically the same information from EMT Smith that he received from Shift Foreman Tomlin at the mine site. (Tr. 270-71). He did not receive any information from the hospital to alter his opinion. (Tr. 271). Given that Life Flight had been called and there was a serious accident, Tennant decided to call MSHA so that inspectors coming in would know something "about the event." (Tr. 272).

In addition to Tennant, Danny Tomlin was the "responsible person" to make the call to MSHA. (Tr. 272). In the past, Tennant had made approximately 15-25 (or less) calls to MSHA to report injuries which had the reasonable potential to cause death. (Tr. 274). Tennant "typically use[d] common sense" in deciding to make such calls; he considered such factors as amputations, CPR, attempts to stop bleeding, lack of alertness, unconsciousness, blunt force trauma to the head or upper extremities to be triggers to call MSHA. (Tr. 274). Tennant never took into account the nature of the event in determining "reportability" under § 50.10(b), but only the seriousness of the injuries. (Tr. 275).

During his initial phone conversation with Cecil, Tennant had not asked questions about whether Stern had upper body or lower body injuries, whether CPR had been performed, whether there were any amputations, any kind of profuse bleeding or internal bleeding, whether there were any blood pressure issues, or why EMT had thought it necessary to call Life Flight. (Tr. 282-83). After learning of the accident, Tennant was initially concerned about Stern receiving proper care—not calling MSHA. (Tr. 284-85).

[17] As argued at hearing and indeed throughout these proceedings, both parties contested whether this and similar phrases referred to the type of injury or the type of accident. (*See also* Tr. 266).

Susan Bealko

Susan Bealko, corporate safety director for GMS, testified at hearing.[18] (Tr. 288). Bealko had first learned of Stern's accident on August 12, 2013, at approximately 3:45-4:00 a.m. from Mike Fleece, GMS's PA ops coordinator. (Tr. 289-90). After getting dressed and dropping off grain for her horse, she left for the hospital at approximately 4:15-4:20 a.m. (Tr. 291). She met Fleece at the hospital; Fleece advised her that Randy Cumberledge, the site coordinator, was speaking with Stern. (Tr. 290-91). At some point, a doctor came out, announcing that Stern was stable and was being prepped for surgery. (Tr. 293). There had been a "small bleed" that had since ceased. (Tr. 293). Surgery was performed at around 1:00 p.m. (Tr. 293).

Bealko had heard nothing that led her to believe that Stern's injuries had a reasonable potential to cause death. (Tr. 293). She did not contact MSHA regarding such because as GMS's safety director she felt Stern's injuries were not life threatening. (Tr. 294).

Bealko had not gone to Bailey Mine before going to the hospital and had therefore not observed Stern at the accident site. (Tr. 300).

Richard Marlowe

At hearing, Richard Marlowe testified on behalf of Respondent.[19] (Tr. 301-02). Marlowe testified that in August 2013, Marlowe was "probably" the director of safety awareness. (Tr. 302). Referring to RX-5, "RPI's August 2013," Marlowe stated that reports of personal injury were put together and distributed to various business units in mines. (Tr. 303). He had circulated the August 2013 RPI in question. (Tr. 304). Based upon his review of the (Stern) incident, Marlowe had determined the situation had a potential for fatality. (Tr. 305). The form was not meant to indicate the likely outcome of injuries. (Tr. 310). In a situation involving an individual getting pinched between two pieces of equipment, Marlowe testified that, if such a condition was allowed to continue, a fatality could reasonably be expected to take place. (Tr. 310-11). There could be a situation with a high fatal potential but with no actual injuries involved. (Tr. 311).

Marlow had not been present at the Bailey Mine when Stern was injured, had not directly observed any of Stern's injuries, and had not specifically participated in the accident investigation. (Tr. 315).

IV. Contentions of the Parties

Respondent argues that the Secretary failed to meet its burden of proof in proving a §50.10(b) violation for Citation No. 7076747. *Resp't Post-Hearing Br.* at 11-26. Respondent

[18] She had been corporate safety director for 5 years and had been in the mining industry for 27 years. (Tr. 288). Bealko had a mining engineer degree from Penn State. (Tr. 288). She had also worked for NIOSH, the mining research branch of MSHA. (Tr. 288).

[19] Marlowe had an undergraduate degree in mining engineering technology and a master's in safety management. (Tr. 302).

contends that Stern's injuries were not life-threatening and did not have the reasonable potential to cause death. *Resp't Post-Hearing Br.* at 12-21. Respondent also contends that the surrounding circumstances of the accident are not relevant and that the accident did not involve an injury with the reasonable potential to cause death. *Resp't Post-Hearing Br.* at 21-22, 26-27. Respondent further contends that the statutory provision in 30 U.S.C. § 813(j) is in conflict with the regulation in 30 C.F.R. § 50.10(b), and in such instances the statute prevails. Furthermore, it argues that the reporting requirement is subjective and should be subjectively applied. *Resp't Post-Hearing Br.* at 22-26. Additionally, Respondent argues the negligence should be assessed at low, there was no fair notice of the violation's interpretation, and the penalty should be decreased from $5,000.00. *Resp't Post-Hearing Br.* at 31-33. Respondent also essentially argued that neither a totality of the circumstances test nor a reasonable person test are not appropriate for §50.10(b). *Resp't Reply Br.* at 12-17.

The Secretary argues that Respondent violated 30 C.F.R. § 50.10(b), that the Respondent was moderately negligent, and that the penalty should be assessed at $5,000.00. *Sec'y Post-Hearing Br.* at 12-30. The Secretary contends that the Respondent knew or should have known within 15 minutes of its occurrence that Stern's accident involved injuries with a reasonable potential to cause death. *Sec'y Post-Hearing Br.* at 14-28. The Secretary further contends that the Respondent had adequate notice of the standard. *Sec'y Reply Br.* at 9-12.

V. Issue Presented

In determining whether 50.50(b) has been violated, should a "totality of the circumstances" test be utilized, including such factors as a "nature of the accident" and signs and symptoms of injury at the time of accident and immediately thereafter?

VI. Law and Regulations

30 C.F.R. § 50.10(b) Immediate notification in pertinent part provides as follows:

> The operator shall immediately contact MSHA at once and without delay and within 15 minutes…once the operator knows or should know that an accident has occurred involving: …(b) an injury of an individual at the mine which has a reasonable potential to cause death.

VII. Findings of Fact and Conclusions of Law

In arriving at its within decision that Stern's injuries evinced a reasonable potential to cause death and that Respondent had correspondingly failed in its notification duty under § 50.10(b), this Court recognizes that operators are not expected to be experts in diagnosis or prognosis at the scene of a mine accident. This Court also recognizes that there is not a statutory or a regulatory definition of "reasonable potential to cause death" and further notes the

Commission's declining to define such in *Signal Peak Energy, LLC*, 37 FMSHRC 470 (Mar. 2015).[20]

Moreover, there is undoubtedly *a gray area* in determining whether an injury is *potentially* fatal and *actually* fatal.[21]

However, operators are not left at sea—without direction—as to when to notify MSHA of an accident. There are numerous navigational instruments to guide them to a proper determination.

A. Any Reasonable Doubt Must Be Resolved in Favor of Notification

As the Commission has made abundantly clear in *Signal Peak Energy, LLC,* any "reasonable doubt" in determining whether MSHA should immediately be notified *must* be resolved in favor of notification. 37 FMSHRC 470, 477 (Mar. 2015).

This should be the North Star directing all mine operators in their search for a proper determination under §50.10(b).

The Respondent had advanced various arguments (of varying merit) explaining its failure to immediately notify MSHA. However, the circumstances surrounding Stern's injuries should have raised multiple red flags of doubt to any prudent operator—doubt that should have been resolved in favor of notification.

B. Operators Must Be Guided by the Protective Purpose of the Act and the Standard

As held by the Commission in *Signal*, in determining whether or not to call MSHA, an operator should be guided by the protective purpose of the Act and § 50.10(b) mandatory standard. *Signal* at 477. The preamble to the final rule addressing 30 C.F.R. § 50.10 in 2006 stated:

> In emergencies, where delay in responding can mean the difference between life and death, immediate notification leads the mobilization of an effective mine emergency response. Immediate notification activates MSHA emergency response efforts, which can be critical in saving lives, stabilizing the situation, and preserving the accident scene. Immediate notification also promotes Agency assistance of the mine's first responder efforts. In other situations, it allows for a range of appropriate Agency responses depending on the circumstances. It alerts MSHA to trends or warning signals that can trigger a special inspection, an investigation, or targeted enforcement. This communication also encourages

[20] *See also* Commissioner Cohen's dissent calling for a definition in *Signal Peak Energy, LLC*, 37 FMSHRC at 477 n. 8.

[21] T.S. Eliot's lines in *The Hollow Men* are called to mind "between the potency and the existence…falls the shadow."

> operators and miners to work with MSHA to develop procedures that prevent incidents from resulting in more hazardous situations, ultimately leading to disasters.

71 Fed. Reg. at 71, 431.

Thus, in addition to *Signal's* directive that all reasonable doubts be resolved in favor of notification, operators have two other bright beacons directing their § 50.10(b) considerations: the protective purpose of the Act and mandatory safety standard.

It is clear that the circumstances surrounding the accident and injury must be considered. For example, under the definition of accident provided in §50.2, several examples are given as to what constitutes an accident, including an injury at a mine with the reasonable potential to cause death, entrapment for more than 30 minutes, unplanned inundation, and an unplanned fire. *See* 30 C.F.R § 50.2. Most of the enumerated examples describe circumstances, rather than injuries. Thus it is clear that §50.10(b) does not exclude and in fact encourages an analysis of the circumstances surrounding the event causing a mine injury. *See id.*

Similar to most controversies arising out of the Mine Act, determinations regarding § 50.10(b) notifications are necessarily fact specific and must be evaluated on a case-by-case basis with due consideration for the totality of the circumstances. *See e.g.*, *Black Beauty Coal Co*., 36 FMSHRC 1821 (March 10, 2014) (ALJ) (holding safeguard notice requirements for a water accumulation violation are analyzed on a case-by-case basis).

This Court rejects the Respondent's arguments that a totality of the circumstances approach, including consideration of the nature of the accident, should not be employed in determining whether a miner's injury is reportable under § 50.10(b).

In *Signal Peak Energy,* the Commission unequivocally held that all "readily available information"—"including the nature of the accident" should be considered in determining whether an injury was reportable. *Signal Peak Energy, LLC*, 37 FMSHRC at 476. The Commission noted that such evidence was "highly relevant." *Id.* Because the extent of an injury is not always immediately apparent, the Commission reasoned that the specific circumstances, including how the injury occurred, should be considered by the mine operator.[22] *Id.* As discussed *intra*, the Secretary has presented persuasive documentary and testimonial evidence that the type of accident in which Stern was involved—being crushed[23] in a red zone between two large pieces of machinery—often leads to fatal injury.

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[22] In *Red River Coal Co*., 39 FMSHRC 368, 391 (Feb. 2017)(ALJ) Judge Feldman considered the nature of the miner's accident in concluding that the operator had violated § 50.10(b).

[23] Although the word "pinched" is used in the technical sense to describe the type of Red Zone incident in which Stern was involved, the word "crushed" more accurately describes the injury process actually suffered by Stern.

In arguing that the nature of Stern's accident should not be taken into account, Respondent ignores *Signal's* holding that "the nature of the accident" is highly relevant information in determining whether an injury should be reported. This Court cannot accept Respondent's suggested analytical approach. Any prudent operator, familiar with the industry, knew or should have known that the type of accident that Stern suffered often leads to death.[24] To ignore this elephant in the room is a sophistic misadventure that no mine operator, including Respondent, should engage in when determining to alert MSHA.

C. Reasonable Potential to Cause Death Interpretation

Respondent argued that §50.10(b) is not clear, and does not include an analysis of the nature of the accident.[25] When the plain language of a standard is clear and unambiguous, the Commission has held that the standard provides operators with fair notice. *Dynamic Energy, Inc.,* 32 FMSHRC 1168, 1172 (Sept. 2010); *Bluestone Coal Corp.,* 19 FMSHRC 1025, 1031 (June 1997). The Commission has held that the "reasonable potential to cause death" uses a reasonable person standard. *Signal Peak, LLC*, 37 FMSHRC at 477. The Commission has specifically stated that the reasonable potential to cause death is case specific and requires consideration of the accident causing the injury. *Wolf Run Mining Co*., 35 FMSHRC 3512, 3517 (December 2013). It is this Court's view that a reasonable potential to cause death is a clear standard.

If the meaning of a standard is ambiguous, the Secretary's interpretation of its own regulation may be given deference. *See Auer v. Robbins,* 519 U.S. 452 (1997); *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Dynamic Energy, Inc.,* 32 FMSHRC 1168, 1171-72 (2010). Deference is not appropriate when an agency's interpretation is unreasonable or inconsistent with the regulation. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citing *Auer,* 519 U.S at 462). An agency's interpretation may also not be given deference when it conflicts with a prior interpretation. *See, Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 155 (2012)(citing *Thomas Jefferson Univ. v, Shalala, 512 U.S. 504, 515* (1994)). While this Court does find §50.10 to be clear and unambiguous, the Secretary's interpretation that a totality of the circumstances test should be used is also reasonable and should be given deference. The Mine Act was written in order to protect miners' health and safety. When analyzing MSHA's reporting requirement under §50.10(b), it is reasonable that the Secretary

[24] Additionally, it should be noted that many injuries, such as inhalation, internal bleeding, and the like are not visible. Therefore, the circumstances surrounding the injury are highly relevant in determining the extent of the possible injury.

[25] Respondent also argues that 30 U.S.C. § 813(j) conflicts with 30 C.F.R. § 50.10(b) in that §813(j) states that an operator must call MSHA when he *realizes* an injury has occurred with the reasonable potential to cause death. Whereas §50.10(b) states that an operator must call MSHA when an operator *knows or should have known* of an accident involving an injury with the reasonable potential to cause death. (*Resp't Post-Hearing Br.* at 22-27). This Court finds there to be no conflict in this case as the facts and testimony provide the same result. Due to the circumstances surrounding the accident and injury, it is clear that MSHA should have been called within 15 minutes of the accident.

should consider the circumstances that resulted in an injury. Thus, a totality of the circumstances test is appropriate under the regulations.

D. Preamble to Final Rule for Section 50.10

Contrary to Respondent's suggestions otherwise, the preamble to section 50.10 does not contain an exhaustive all-inclusive list of injuries requiring immediate MSHA notification. Rather it is a practical guide to operators citing "some" types of injuries that, based upon MSHA's past experience and based upon common medical knowledge, have the reasonable potential to cause death.[26]

E. Signs and Symptoms of Injury

When considering the totality of the circumstances, the Respondent argues correctly that signs and symptoms of injury are important factors in considering a § 50.10(b) MSHA notification.

However, in considering Stern's mental and physical signs and symptoms, this Court has given much more probative weight to the evidence of injury available *at the scene of the accident and at the time of the accident and immediately thereafter*. Medical information gathered from treatment sources at the hospital and thereafter—for example, reports that Stern's condition was improving and that, with or without surgical intervention, Stern's intestinal bleeding had ceased—has been accorded much less substantive weight in assessing the propriety of operator's § 50.10(b) determination than the signs and symptoms witnessed at the accident scene and time.

In proceeding thusly, this Court has been guided by the Commission's holdings in *Signal* and *Cougar Coal* that the need for a *prompt* determination is inherent in § 50.10 and that permitting operators to wait for a medical or clinical opinion would frustrate the immediate reporting of accidents.[27]

1. Consciousness and Alertness

This Court further agrees with Respondent that consciousness and alertness are factors which may indicate a non-fatal injury. However, standing alone, they are not necessarily contra

[26] The ALJ notes a back and forth between counsel questioning Shannon Smith as to whether Stern's blunt force trauma was in the upper or lower body. Any doubt regarding such at the accident scene should again have been resolved in favor of MSHA notification.

[27] If an operator is permitted to wait for and consider information beyond the narrow confines of time and space addressed herein, all types of speculation and delay may enter his determination. For instance, in this case, Stern had to undergo hospitalization and surgery. Given that medical error is now the 3rd leading cause of death in the U.S. and given that thousands of our citizens die annually due to hospital borne infection—should an operator be required to deem any injury requiring later surgery and/or hospitalization to have a reasonable potential to cause death?

indicative of a potentially fatal injury. Bartlett's Familiar Quotations is full of memorable dying declarations which—though quite lucid and profound—were uttered by individuals close to death.[28]

Likewise, the Commission and its judges have recognized that the maintenance of consciousness at the scene does not by itself preclude a finding of a § 50.10(b) violation. *Webster County Coal, LLC*, 2017 WL 2306333 (May 23, 2017)(ALJ).

In *Red River Coal*, a miner had been struck in the head by a pressurized end cap. *Red River Coal*, 39 FMSHRC 368, 389 (Feb. 21, 2017)(ALJ). The maintenance shop foreman, a certified EMT, found *the miner conscious at the scene with stable vital signs and minimal blood loss*—as in the case *sub judice*. *Id*. at 389-90. After considering however, the totality of the evidence, including the nature of the accident which involved blunt force trauma to the head and the fact that Life Flight had been called, Judge Feldman concluded § 50.10(b) had been violated. *Id.* at 391-92.

In *Cougar Coal Co*., 25 FMSHRC 513 (Sept. 2003) the Commission on its own motion reviewed an ALJ's dismissal of a citation under 30 C.F.R. § 50.10. In *Cougar Coal* the victim had received an electric shock of exposure to 7,200 volts of electricity and had fallen a distance of 18 feet. *Cougar*, 25 FMSHRC at 514. Rejecting the ALJ's reliance upon the operator's assertion that the victim was conscious and alert when management personnel arrived at the scene, the Commission specifically found that the judge "incorrectly discounted testimony related to 'the nature of the accident' as irrelevant to the question of whether the injuries had a reasonable potential to cause death." *Id.* at 520

2. Complaints of Pain

At hearing, there was consistent testimony that Stern had voiced complaints of being in severe pain to Bailey Mine and GMS personnel. A prudent miner might reasonably consider such a symptom as being indicative of potentially fatal injury.

At hearing, it was reported that Stern had also described a sensation that his "guts were coming out of his penis." (Tr. 83). This symptom was so severe in nature that Shannon Smith was compelled to check Stern's genitals. (Tr. 173). Such a bizarre and extreme sensation might also be reasonably interpreted as indicative of a potentially fatal injury.

3. Bent Leg and Lower Extremity Paralysis

At hearing it was also reported that Stern also had an odd bend to one of his legs and had complained of being unable to move a leg. (Tr. 270-71). Signs of fracture and complaints of lower extremity paralysis would be additional symptoms alerting a prudent miner of his duty to immediately notify MSHA.

[28] Witness Moliere's reported last words: "Draw the curtain, the farce is over."

4. Abrasions and Blood Loss

Visible signs of abrasions and some blood loss were also witnessed at the accident scene. (Tr. 87). Considered alone, these signs may not have been indicative of injuries with the reasonable potential to cause death. However, when viewed in combination with Stern's other signs and symptoms, a reasonably prudent miner would be motivated to immediately notify MSHA.

At hearing, Respondent argued that bruising could be associated with relatively minor injuries. (Tr. 180-81). The ALJ took Respondent's point that there are different degrees of bruising and associated internal bleeding dependent upon the type of trauma and body part affected. However, in the instant matter, there was obvious major trauma to Stern's torso.

5. Stomach Swelling and Internal Bleeding

One of the most ominous signs of potentially fatal injury testified to at hearing was that of Stern's reported stomach swelling/distention. (*See* Tr. 83).

At hearing, Smith acknowledged that Life Flight had been called due to fear that Stern might be experiencing internal bleeding which could lead to death. (Tr. 179-80).

The fact that Stern's internal bleeding had eventually receded, does not diminish the point that such a sign at *the mine accident site immediately after the accident* would have alerted a prudent operator to notify MSHA under § 50.10(b).

6. Stern's Farewell to Family

In addition to Stern's physical symptoms and signs which supported a determination that his injuries might be fatal in nature, Stern exhibited mental symptoms in support of such.

At the accident scene Stern requested that, if anything happened to him, Shannon Smith tell Stern's wife and family that he loved them. (Tr. 174). Individuals do not normally make such a request unless they themselves fear that their injuries are life threatening.

A prudent operator would reasonably find such a fear-filled family farewell to have been further evidence of a potentially fatal injury.

7. Call for Life Flight

Regardless of Respondent's various explanations minimizing its call for Life Flight—a reasonable inference to be drawn was that Respondent was justifiably concerned that Stern's injuries might be life-threatening. Smith's essential admission that Stern's injuries may be life-threatening pulled the lynch pin out from under Respondent's arguments otherwise. (Tr. 180).

F. Given the Totality of the Circumstances a § 50.10(b) Notification was Mandated

Respondent has raised various points of arguable merit justifying its failure to notify MSHA under § 50.10(b). Further, this Court grants that Respondent may have been acting in good faith in its violative actions. However, considering the totality of the circumstances in light of the protective purpose of the Act and mandatory safety standard, a prudent operator, knowledgeable of the industry would have or should have known that Stern's injuries had the reasonable potential to cause death, and therefore, had a duty to immediately notify MSHA.

G. Negligence

Respondent has argued that the Secretary's assessment of moderate negligence should be modified to low negligence. (*Resp't Post-Hearing Br.* at 31-33). An operator is moderately negligent when "the operator knew or should have known of the violative condition or practice but there are mitigating circumstances." 30 C.F.R. § 100.3 Table X. Low negligence conversely requires "considerable mitigating circumstances." *Id.*

As stated above, this Court finds that Respondent knew or should have known that an accident occurred with the reasonable potential to cause death. The nature of the accident, Stern being crushed between two several ton machines, Stern's belief that he might die, Stern's description of his injury including the feeling of something coming out of his genitals, Stern's stomach swelling indicating internal bleeding, and his inability to move his legs properly—all indicated that the Respondent knew or should have known that an accident occurred that had the reasonable potential to cause death.

Respondent did not call MSHA within the 15-minute time limit as §50.10(b) required when an accident with the reasonable potential to cause death has occurred. Although Respondent called Life Flight and seemed to react quickly and efficiently to help Stern after his injury, and although Respondent eventually called MSHA approximately two hours after Stern's injury occurred, nonetheless this Court does not find considerable mitigating circumstances, and affirms the Secretary's moderate negligence assessment.

H. Fair Notice

Respondent also argues that it did not have fair notice of the meaning and interpretation of the phrase "Operator realizes that…an injury…which has a reasonable potential to cause death." *Resp't Post-Hearing Br.* at 27-31.

To satisfy constitutional due process requirements, regulations must be sufficiently specific to give adequate notice of the conduct they prohibit or require. *See Grayned v. Rockford*, 408 U.S. 104,108 (1972). The Commission has stated that notice for an ambiguous regulation asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *DQ Fire & Explosion Consultants*, 36 FMSHRC 3083, 3087 (Dec. 2014) (internal quotations omitted)(*quoting* Ideal Cement Co., 12 FMSHRC 2409, 2416 (Nov. 1990)). Thus, a reasonably prudent miner has adequate notice of a regulation when he knows—

after considering the purpose of the provision—that said provision applies to a particular situation. *See e.g. Grayned*, 408 U.S. at 112; *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997).

In this case, Stern was crushed between a scoop and railcar, both of which weighed between 5 and 10 tons. Stern complained of extreme pain, could not move his legs properly, believed something was coming from his genitals. Futher, he had stomach swelling, which indicated internal bleeding. Respondent's witness Smith, a fire boss examiner, believed that Stern's internal bleeding had the potential to cause death. *See* (Tr.180). All of these circumstances demand that a reasonably prudent miner would believe that Stern's condition had the potential to cause death.

VIII. Penalty

The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> …the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

30 C.F.R. §100.4(c) states that the penalty for failure to provide timely notification to MSHA "will not be less than $5,000 and not more than $65,000 for the following accidents:...2) An injury…of an individual at the mine, which has a reasonable potential to cause death." Section 110(a)(2) of the Act similarly states that an operator "who fails to provide timely notification to the Secretary as required under 103(j) of [the Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000."[29] 30 U.S.C. §820(a)(2).

The Secretary assessed a penalty of $5,000.00, and for the following reasons, this Court affirms the assessment of $5,000.00.

The Secretary has brought forward no evidence of previous §50.10(b) violations. Additionally, Bailey Mine is a large mine with an annual production capacity of 10.2 million tons in 2015 and 12.3 million tons in 2014. (GX-15). Respondent was moderately negligent as set forth above. The parties have stipulated that an assessment of $5,000.00 would not affect the operator's ability to continue in business. J.S.-4.

[29] In 2012, the $60,000 maximum was raised to $65,000 to account for inflation. *Signal*, at 484, n. 21.

The gravity of the violation is "No Likelihood" of a "No Lost Workdays" injury. Based on the foregoing, this Court finds that a penalty of $5,000.00 is appropriate.

ORDER

The Respondent, Consol Pennsylvania Coal Company, LLC, is **ORDERED** to pay the Secretary of Labor the sum of $5,000.00 within 30 days of this order. [30]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

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[30] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 19, 2017

JASON FARMER, Complainant v. SPARTAN MINING CO., LLC, AND ALPHA NATURAL RESOURCES HOLDINGS, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. WEVA 2017-343-D MSHA No. PINE-CD-2017-01 Mine: Road Fork #51 Mine Mine ID: 46-01544

ORDER DENYING SPARTAN MINING CO., LLC'S MOTION TO DISMISS

Before: Judge McCarthy

I. Statement of the Case

This matter is before me upon a discrimination complaint filed by Jason Farmer ("Farmer" or "Complainant") on April 19, 2017 pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act" or "Mine Act"). 30 U.S.C. § 815(c)(3). Respondent Alpha Natural Resources Holdings, Inc. ("Alpha") filed its Motion to Dismiss and Answer on May 12, 2017, and Respondent Spartan Mining Co., LLC ("Spartan") filed its Motion to Dismiss and Answer on May 15, 2017.

For the reasons set forth below, I **DENY** Spartan's Motion to Dismiss, and **GRANT** Farmer's request to withdraw his complaint against Alpha, rendering Alpha's Motion to Dismiss as moot.[1]

II. Factual and Procedural Background

Beginning in 2006, Farmer worked for Spartan for approximately ten years. Compl. 1. On July 18, 2016, Farmer began to experience breathing difficulties, which ultimately rendered him unable to work for several weeks. *Id*. During this time period, Farmer learned that he had developed Coal Worker's Pneumoconiosis ("Black Lung"). *Id*. 1-2.

[1] Alpha is the ultimate parent holding company of Spartan. Alpha Mot. to Dismiss 2. As noted by Alpha in its Answer and Motion to Dismiss, "Alpha Holdings is many steps removed from Spartan in the corporate hierarchy. In fact, numerous partially and/or wholly-owned subsidiaries separate Alpha Holdings and Spartan." *Id*. In any event, Farmer has requested judicial approval for withdrawal of his complaint against Alpha pursuant to Commission Procedural Rule 11. 29 C.F.R. § 2700.11. Farmer Resp. to Mot. to Dismiss 1. As stated above, this request is granted.

On or about September 1, 2016, Farmer returned to work for Spartan, informed Spartan of his breathing difficulties, and requested to be moved away from the working face of the mine to a less-dusty area. *Id.* 2. Farmer also "informed the Respondents that he had recently filed for protection under 30 C.F.R. Part 90, that his Part 90 application was currently pending review," and that "he had a positive x-ray showing that he was suffering from black lung disease."[2] *Id*. Spartan denies that Farmer filed for Part 90 protection upon his return on September 1, 2016, but that Farmer had instead only "mentioned his intent to file." Spartan Answer 2.

At Farmer's request, he was subsequently reassigned to a position outby the face. Compl. 2. However, following his reassignment, Farmer alleges his hours were reduced and that he was still subjected to dusty conditions, which further aggravated his breathing difficulties. *Id.* 2-3. Spartan disputes any loss of Farmer's income due a reduction in hours, or that the outby assignment "would be considered highly dusty or otherwise violate the appropriate respirable dust standard." Spartan Answer 2-3. Further, Spartan "specifically denies the allegations related to aggravation of his breathing condition as no such complaints or issues were raised with management while Complainant worked with Spartan." *Id*. 3.

Farmer alleges that on or about September 25, 2016, he notified Spartan via facsimile that "having already complained to the Respondents about excessive dust on numerous occasions – only to be misled into working in yet another highly dusty position [he] became unable to continue working his job." Compl. 3. Spartan disputes this, and instead alleges that Farmer filed his 105(c)(2) discrimination complaint with MSHA on October 24, 2016 before reporting to work that day, and that Farmer then faxed his notice that he was unable to continue working in his job the next day, October 25, 2016. Spartan Answer 3.

The parties do not dispute that Farmer filed his 105(c)(2) discrimination complaint with the Mine Safety and Health Administration ("MSHA") on October 24, 2016.[3] Compl. 3. Farmer's discrimination complaint states, in relevant part:

> On July 18, 2016, I had begun struggling to breathe and became unable to work the next day. I was out till [sic] September 1, 2016. Severe breathing difficulty has caused me to request not to work in return air. Company requires roof bolt operators to bolt in return air multiple times per shift. I seek an injunction to keep me out of return air and dusty environments at all times. I filed for Part 90 and company officials told me that I had to continue working in dust. Since I filed for Part 90 and returned to work, I have lost wages and hours, and have been moved to a less desirable schedule that precludes me from honoring my family commitments. I have

[2] 30 C.F.R. § 90.1 provides coal miners who provide evidence of black lung the option to work in less dusty areas of a mine.

[3] Farmer's 105(c)(2) complaint consists of two, one-page forms, MSHA 2000-123 and MSHA 2000-124. Compl. Ex. 1 at 1-2.

> been constructively discharged by having to work in dust after my protests, Part 90 application, and my movement to another job outby. I have to shovel belt and operate a roof bolt machine outby after filing for Part 90. I request to be made whole for my losses of wages and hours, be restored to my former swing schedule, and be kept in low-dust working conditions.

Compl. Ex. 1, at 2. On Form 2000-123, Farmer alleged that the date of the discriminatory action was September 1, 2016. *Id.* at 1. Under Section E of the same form, Farmer indicated that a copy of all MSHA correspondence should be sent to his attorney, Samuel K. Petsonk. *Id*.[4]

On or about October 25, 2016, MSHA complaint processor Angela K. Thomas sent an acknowledgement letter to Farmer that his 105(c)(2) complaint had been assigned to special investigator Tim Brown. Farmer Resp. to Mot. to Dismiss Ex. A, at 1. There is no indication that a copy of the acknowledgment letter was sent to Petsonk, Farmer's attorney, as requested in Farmer's complaint. *Id*. Petsonk "continued representing Mr. Farmer by appearing along with him in front of special investigator Tim Brown, and at all other points of the investigation by MSHA District 12." Compl. 4.

On or about December 16, 2016, MSHA's Chief of the Technical Compliance and Investigation Office, Carolyn T. James, purportedly sent a standard *pro forma* determination letter to Farmer, with copy to Spartan, stating in relevant part:

> Based on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred. For that reason, the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("the Commission") in this matter.
>
> However, you continue to have the right to file a discrimination case on your own behalf with the Commission. If you decide to file your own case, you must do so within 30 days of this letter by sending a discrimination complaint to the Commission at the following address . . . .

Compl. Ex. 2, at 3. There is no evidence in the record indicating that a copy of the December 16, 2016 determination letter was sent to Petsonk, as per Farmer's request under Section E of his discrimination complaint. Compl. Ex. 1 at 1 and Ex. 2 at 3-4.

[4] Section E of MSHA Form 2000-123 states: "[i]f you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name and address to the right." *Id*.

On February 17, 2017, Petsonk states that he "verbally contacted" MSHA to follow-up with the status of their investigation. Farmer Resp. to Mot. to Dismiss 3. On February 21, 2017, MSHA supervisory special investigator/conference litigation representative, Charles R. Bigley, emailed Petsonk, and stated the following:

> The 105 you questioned, concerning the status, was closed on 12/16/2016. Records indicate the decision was made on 12/13/2016 that the evidence did not support a violation of 105c. The letter notifying the complainant of the decision was mailed from TCIO on 12/16/2016.

Compl. Ex. 2, at 1-2. On March 21, 2017, Petsonk responded:

> I was registered as his representative from the time of the initial filing of the 123/124 forms, and I have never yet been sent a copy of the decision by TCIO. Accordingly, I believe that an effective final decision from TCIO has not yet issued in this matter of Jason Farmer v. Spartan Mining. Please advise.

Id. at 1. The next day, March 22, 2017, Bigley replied:

> Attached is the decision letter from TCIO to Mr. Farmer copied from the case file. Likely just an oversight that a copy was not mailed to you the same day it was mailed to the complainant. Sorry for any inconvenience this may have caused.

Id. On April 19, 2017, and within 30 days of Petsonk's receipt of the determination letter from TCIO, Petsonk filed a 105(c)(3) action on Farmer's behalf with the Commission against Respondents Alpha and Spartan.

On May 12, 2017, Respondent Alpha Natural Resources Holdings, Inc. ("Alpha") filed its Answer and Motion to Dismiss.

On May 15, 2017, Spartan filed its Answer, Affirmative Defenses, and Motion to Dismiss. In its motion, Spartan moved to dismiss Farmer's complaint as untimely under section 105(c)(3) arguing that "MSHA's Technical Compliance and Investigations Office (TICO) [sic] issued its decision on December 16, 2016, but Complainant did not file his Complaint until April 12, 2017, well outside the 30-day deadline." Spartan's Mot. to Dismiss 1.

On May 22, 2017, Farmer filed his response to Spartan, and requested judicial approval to withdraw his complaint against Alpha.

III. Principles of Law

A. The Act

Section 105(c)(3) of the Act provides that:

> [w]ithin 90 days of receipt of a 105(c)(2) discrimination complaint, the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred . . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . .

30 U.S.C. § 815(c)(3). The Act's legislative history instructs that the time limits imposed in 105(c) should not be considered jurisdictional:

> In addition, under section [105(c)(3)], if the Secretary determines that no violation has occurred, the complainant has the right within 30 days of receipt of the Secretary's determination, to file an action on his own behalf before the Commission . . . . this thirty-day limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement.

S. Rep. No. 95-181, 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. Hist. of the Fed. Mine Safety and Health Act of 1977* at 37 (1978). This interpretation is consistent with "the primary objective of [the] Act," which is "to assure the maximum safety and health of miners." *Id* at 46.

B. Commission Precedent

The Commission similarly interprets 105(c) time limitations as non-jurisdictional. *E.g., Sec'y of Lab. o/b/o Clayton Nantz v. Nally & Hamilton Enter., Inc.*, 16 FMSHRC 2208, 2215 (Nov. 1994) (internal citation omitted); *Ronny Boswell v. Nat'l Cement Co.,* 14 FMSHRC 253, 257 (Feb. 1992) (internal citations omitted). Accordingly, 105(c) time limitations are treated as a statute of limitations period subject to equitable tolling. *N. Assoc. Coal Co.*, 8 IBMA 164 (Sept. 1977).[5] Ultimately, however, the decision to permit or reject an untimely 105(c) filing is determined on a case-by-case basis, "taking into account the unique circumstances of each

[5] The Commission's interpretation was recently upheld by the Tenth Circuit. *Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007, 1012 (10th Cir. 2004) ("[T]he Commission's interpretation of the Mine Act to permit equitable tolling is supported by both the background presumptions against which the Act was written and the Act's legislative history . . . . the Commission's interpretation is reasonable and deserves deference.").

situation." *Robinson v. Vulcan Constr. Materials, LP,* 36 FMSHRC 1084, 1093–94 (April 2014); *see also Boswell*, 14 FMSHRC at 257; *Clyde Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996) (internal citation omitted).

One relevant factor in a 105(c) timeliness analysis is a good-cause showing of "justifiable circumstances" for a late filing in order to prevent stale claims brought by one who has "knowingly slumbered on his rights." *Farmer v. Island Creek Coal Co.,*13 FMSHRC 1226, 1230–31 (May 1991); *Herman v. Imco Servs.*, 4 FMSHRC 2135, 2137–38 (Dec. 1982); *Cf. Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21 at 25 (Jan. 1984). Justifiable circumstances have been found in instances of "ignorance, mistake, inadvertence, and excusable neglect." *Perry,* 18 FMSHRC at 1921–22 (citation omitted); *see also Boswell*, 14 FMSHRC at 257. A good-cause showing must then be weighed against any demonstration of material legal prejudice by the operator. *Hale, v. 4-A Coal Co.,* 8 FMSHRC 905, 908 (June 1986). Legal prejudice is "material" when it affects "issues necessary to a meaningful opportunity to defend," and can include instances of "serious delay" by Complainant. *Farmer*, 13 FMSHRC at 1231 (citation omitted).[6] The Commission has held that an operator's demonstration of material legal prejudice is a "primary consideration" in the timeliness analysis. *Lujan v. Signal Peak Energy, LLC*, 38 FMSHRC 78, 95 (2016) *citing Hale*, 8 FMSHRC at 908-09; *see also Boswell*, 14 FMSHRC at 257.

IV. Analysis

It is undisputed that Farmer filed his discrimination complaint with MSHA within the 60-day time-frame allotted under 105(c)(2). At issue here is the timeliness of Farmer's subsequent 105(c)(3) complaint, which was filed three months after Farmer, but not his counsel, received TCIO's determination that MSHA would not prosecute his complaint. For the following reasons, I find dismissal on the basis of untimeliness to be unwarranted.

A. Justifiable Circumstances

On his 105(c)(2) discrimination complaint, Farmer listed counsel Petsonk's name and address under Section E of MSHA Form 2000-123. Compl. Ex. 1, at 1. Section E of said form instructs: "If you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name to the right." *Id*. Although the record indicates that MSHA's determination letter was sent to

[6] Regarding material prejudice, the Commission has recognized that "[w]hile the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated" and that more relevant examples of material legal prejudice include "tangible evidence that has since disappeared, faded memories, or missing witnesses." *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984) (citing *Herman,* 4 FMSHRC at 2139). Moreover, "material legal prejudice means more than merely being required to defend a case that could have been avoided if failure to file on time were treated as a jurisdictional defect." *Farmer,* 13 FMSHRC at 1231 (citing *Schulte*, 6 FMSHRC at 13). Regardless, "any delay is a potentially serious matter." *Id*.

Complainant Farmer on December 16, 2016, it appears that a copy was not provided to Petsonk until March 21, 2017. When Petsonk asked MSHA about the status of the investigation and learned that MSHA had informed Complainant Farmer that it was not pursuing the matter, Petsonk asked why he had not been notified as Farmer's counsel. Compl. Ex. 2, at 1-2. MSHA stated in an email reply to Petsonk that it was "[l]ikely just an oversight that a copy was not mailed to you the same day it was mailed to the complainant. Sorry for any inconvenience this may have caused." *Id.* at 1.[7]

The Commission has ruled that a miner cannot file a 105(c)(3) discrimination complaint until they have received the Secretary's determination that there is insufficient evidence that a violation has occurred. *Gilbert v. Sandy Fork Mining Co., Inc.* 9 FMSHRC 1327, 1336 (Aug. 1987). Thus, the 105(c)(3) 30-day time period commences with notice of the Secretary's determination. S. Rep. No. 95-181 at 37; *Boswell*, 14 FMSHRC at 257 ("The statute makes clear that the time for filing begins to run upon 'notice' of the Secretary's action."); *Keys, Jr. v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1128 (Oct. 1999) (ALJ) ("the 30 day time period prescribed in section 105(c)(3) of the Act and Commission Rule 2700.412 commences with receipt of the determination, not the purported mailing date") (footnote omitted). Absent any showing to the contrary, the record indicates that Petsonk first became aware that a determination letter had been issued on February 21, 2017, and first received a copy of said letter from MSHA on March 21, 2017. If March 21, 2017 is taken as the date of written notice to Complainant's legal representative that MSHA was not pursuing Farmer's complaint, then the complaint was timely filed within the requisite 30-day period. In any event, Farmer has made a good-cause showing that an inadvertent administrative oversight was a circumstance justifying Farmer's delayed 105(c)(3) filing.[8]

B. Seriousness of Delay

If proper notice of MSHA's determination letter had been issued to Farmer's counsel on December 16, 2016, the 30-day limit would have tolled on January 15, 2017, and Farmer's subsequent filing on April 19, 2017 would constitute a delay of just over three months. While there is no absolute barometer for how far beyond the 30-day period a complaint can be filed before it is considered to constitute serious delay, it appears that a three-month delay under the instant circumstances is permissible. *See Boswell*, 14 FMSHRC at 257 (12-day delay *de minimis* and resulting "at least in part, from mistake, inadvertence, or excusable neglect."); *Schulte*, 6

[7] MSHA's Special Investigations Procedures Handbook similarly instructs that Section E "[s]hould be completed if Complainant desires copies of correspondence forwarded to another party." MSHA Special Investigations Procedures Handbook PH05-I-4, Chapter 2-1, at 3 (2005).

[8] It is unclear to what extent this oversight was exacerbated by Petsonk's delay in following-up with MSHA. The record shows that Petsonk learned of the final determination letter via Bigley's February 21, 2017 email. Petsonk waited 28 days after receipt of the email to respond. Petsonk contends that during this time he was "investigating the records and confirming that MSHA had not sent any notice of the Dec. 16, 2016 decision to the Complainant's representative." Farmer Resp. to Mot. to Dismiss 4. In these circumstances, I find that Complainant did not sleep on his rights. *Farmer*, 13 FMSHRC at 1230.

FMSHRC at 13 (31-day delay excusable under the circumstances); *see also Jones v. Dee Gold Mining Co.*, 9 FMSHRC 1631, 1634 (Sept. 1987) (ALJ) (five-month delayed filing excusable under the circumstances); *Hale,* 8 FMSHRC at 909 (Jun. 1986) (two-year delay attributable to Secretary's delay excusable under the circumstances); *Sinnott v. Jim Walter Resources, Inc.*, 16 FMSHRC 2445, 2446 (1994) (ALJ) (denying three-year delay as extraordinarily late).

C. Material Legal Prejudice

Although the Complainant bears the burden of demonstrating a good-cause showing of justifiable circumstances for a late filing, the operator bears the burden of demonstrating material legal prejudice. *Schulte*, 6 FMSHRC at 13. Here, Spartan alleges no material legal prejudice arising from Farmer's delayed filing.

V. Order

Complainant has made a good-cause showing of justifiable circumstances for his late filing. The length of delay for the late filing is negligible and resulted from an inadvertent administrative oversight by MSHA. Respondent Spartan has demonstrated no material legal prejudice from the delay. Accordingly, I **DENY** Spartan's Motion to Dismiss, and **GRANT** Farmer's request to withdraw his complaint against Alpha, thus rendering Alpha's motion to dismiss as moot.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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June 21, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2015-260 A.C. No. 36-10045-382289 Mine: Harvey Mine

ORDER GRANTING MOTION FOR LEAVE TO FILE LATE PETITION
ORDER DENYING MOTION TO DISMISS

This docket contains one 104(d)(1) Citation No. 7030582 issued on October 21, 2014, to Consol Pennsylvania Coal Company, LLC ("Consol") at its Harvey mine. Consol checked the appropriate block on MSHA Form 1000-179 contesting the citation, and notice of the contest was received by MSHA on June 10, 2015. Under Commission Procedural Rule 28, the filing of a Petition for the Assessment of Civil Penalty ("Petition") was due within 45 days, or by July 25, 2015. 29 C.F.R. § 2700.28.

The Secretary of Labor's ("Secretary") Motion for Leave to File a Late Petition was filed on March 23, 2016; attached was the Secretary's Petition. Incorporated by reference was a Memorandum in Support of Secretary's Motion for Leave to File a Late Petition.[1] This memorandum included the declarations of two MSHA Coal District 2 employees, set forth *infra*.[2]

On April 1, 2017, Respondent filed a Response in Opposition to the Secretary's Motion to File a Late Petition.[3] On April 14, 2017, the Secretary filed a Motion to Accept the Secretary's Reply to Respondent's Response in Opposition to the Secretary's Motion to Permit Late Filing, and also the Secretary's Reply to Respondent's Response in Opposition.[4] On April 20, 2017,

[1] The Secretary's memorandum will be abbreviated SMEM.

[2] The Declaration of Susan Sikora is marked GX-1; the Declaration of Rebecca L. Kollar is marked GX-2.

[3] The Respondent's opposition will be abbreviated ROPP.

[4] The Secretary's reply will be abbreviated SREP.

Respondent filed a Motion to Dismiss, which included, in the alternative, an Answer to the Petition.[5]

Contentions

The Respondent argues it timely contested the citation, but the Petition was submitted more than 7 months after the date required by Rule 28. ROPP 3; RMD 3. It argues that the Secretary's proffered reasons do not establish "adequate cause" for this delay, but instead demonstrate MSHA has failed to implement checks and balances necessary to protect the rights of operators. ROPP 3. In *PBS Coals, Inc.,* 35 FMSHRC 1501 (May 2013)(ALJ), the filing procedures of MSHA Coal District 2 were examined and found to be minimally adequate; however, there is no indication District 2 has altered its procedure with checks and balances or back-up systems to ensure compliance with the rules. RMD 2-4. It contends that the Secretary's justification is not "plausible" and the absence of system improvements is a "capricious" failure to comply with Rule 28 and grounds for default. ROPP 5; RMD 5. It concludes that the Secretary's superficial explanation that a new employee failed to enter the contest into a tracking spreadsheet does not meet the minimum requirements for adequate cause for the delay. ROPP 3,4.

In addition, Consol argues that it has suffered real prejudice since the mine is idled and the availability of records may be affected. Employees have been transferred to other mines, and the miner who worked on the system at issue in the citation is no longer employed. With time, memories fade and evidence becomes stale. Respondent suggests that like *PBS Coals*, a hearing should be required to obtain more information on the issue of "adequate cause". ROPP 4.

The Secretary argues a clerical error caused the inadvertent failure of the Secretary to file a Petition until March 23, 2016. SMEM 1,2. This was due to an unusual oversight related to a change in administrative personnel, during the final week of employment of a short-term assistant in the District office; the notice of contest was not entered into a case tracking spreadsheet and was not mailed to the Solicitor's office where the Petition would have been timely filed. SMEM 2, 3, 6; SREP 1, 2. The error was discovered by another assistant. When compared to the many matters transferred between District 2 and the offices of MSHA and the Solicitor since 2006, the oversight was a rare occurrence and not indicative of a systemic breakdown in filing procedures. SMEM 2, 3; SREP 2. There is no evidence to suggest this was anything but an inadvertent oversight exacerbated by the departure of an employee. SMEM 3.

In addition, the Secretary notes that it is well settled the filing time deadlines are not jurisdictional, and out-of-time Petitions may be filed if an adequate cause for the delay can be shown. SMEM 4. Further, Respondent has failed to show actual prejudice arising from the delay, claiming essentially that records and people may not be readily available; however, Respondent is responsible for the preservation of relevant notes and the preparation of a defense. SREP 2,3. Even if the mine operator can establish actual prejudice, the public interest in enforcement of the Mine Act is paramount to strict procedural regularity. SMEM 4,7; SREP 4.

[5] The Respondent's Motion to Dismiss will be abbreviated RMD.

Legal Principles

Section 105(a) of the Mine Act provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator…of the civil penalty proposed to be assessed…

30 U.S.C. § 815(a).

If a timely notice of contest is filed, section 105(d) provides:

> The Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing….

30 U.S.C. § 815(d).

Commission Procedural Rule 28 provides:

> Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

29 C.F.R. § 2700.28(a).

The legislative history of the Mine Act reveals the express intent of Congress that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 34 (1977), *reprinted in* Senate Subcommittee on Labor, Comm. on Human Resources., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 622 (1978).

In *Twentymile Coal Company*, 411 F. 3d 256 (2005), the D.C. Circuit Court held that an 11-month delay between an investigation report and the issuance of a proposed penalty assessment was not unreasonable. Two Supreme Court cases were cited, *Brock v. Pierce County,* 476 U.S. 253 (1986) and *Barnhart v. Peabody Coal Co.,* 537 U.S. 149 (2003). In *Brock*, the Supreme Court warned that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* at 260, and concluded that the statutory time provision in that case "was clearly intended to spur the Secretary to action, not to limit the scope of his authority. Congress intended that the Secretary should have maximum authority to protect the integrity of the program." *Id*. at 265. In *Barnhart* the Supreme Court noted that not "since *Brock* have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." *Id*. at 158.

In 1981 the Commission considered a proposed penalty filed about 2 months after the date it was due. *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981). Referring to the legislative history, it was determined that the overriding concern was with enforcement, and the Commission's Rule did not create a "statute" of limitations or procedural "strait jackets." *Id.* at 1715, 1716. The Commission held that upon seeking permission to file late, the request must be predicated upon adequate cause. However, the Commission also held that an operator may object to a late penalty proposal on the grounds of prejudice. *Id.* at 1716.

The Commission has clarified that "adequate cause" will not be found to exist unless a non-frivolous explanation for the delay is provided. The Secretary's excuse may not be facially implausible, and the delay must not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith. Should the Secretary meet the burden of showing adequate cause, the Commission further explained:

> [A]n operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected. Of course, occasions may arise where a judge will find that the Secretary has demonstrated adequate cause and that the operator has brought forth evidence of actual prejudice. The judge in such instances must weigh the interest of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).

Long Branch Energy, 34 FMSHRC 1984, 1991 (Aug. 2012).

Therefore, the burden shifts to the operator to establish actual prejudice. The prejudice must be "real" or "substantial", and demonstrated by a specific showing by the operator. *Id.,* at 1993. There must be more than "inherent prejudice" or mere "danger of prejudice". *Webster County Coal, LLC,* 34 FMSHRC 1946, 1951 (Aug. 2012), citing *Long Branch*.

The Declarations

In pertinent part, the Declaration of Susan Sikora is as follows:

1. I am currently employed by the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), as a Coal Mine Safety and Health Assistant ("CMS&H Assistant") a position I have held since September 22, 2015.
2. The Coal District 2 CMS&H Assistant is responsible for keeping track of and carrying out all of the administrative tasks executed by the Conference and Litigation Representatives ("CLR's") of Coal District 2. These tasks include processing new civil penalty contests and keeping track of important case filing deadlines, such as the due dates of civil penalty petitions and mailing cases to the Philadelphia Office of the Regional Solicitor ("Solicitor's Office").

3. I am familiar with MSHA's civil penalty assessment process and the procedures of civil penalty proceedings before the Commission.
4. Coal District 2 typically receives an automated e-mail from MSHA's internal citation and case tracking software that a matter has been docketed at the Federal Mine Safety and Health Review Commission ("FMSHRC"). This e-mail alerts the CMS&H Assistant that a contest has been filed and whether a CLR or the Solicitor's Office will handle the matter. In either case, the CMS&H Assistant enters the docket number on an Excel spreadsheet.
5. As a CMS&H Assistant I am responsible for implementing a system to manage and track the various cases that came into the office. At Coal District 2 we use an Excel Spreadsheet to organize and maintain information about cases including petition deadlines. This Spreadsheet automatically calculates the petition's due date. If a case is to be transferred to the Solicitor's Office, then the matter is entered in the spreadsheet. The procedure is for the case to be removed from the spreadsheet once a return receipt is e-mailed from United Parcel Services ("UPS") indicating that the package transmitting the case has been delivered.
6. Ms. Neiderheiser was employed as a CMS&H Assistant from on or about March 23, 2015 to on or about July 23, 2015.
7. I was told by former CMS&H Rebecca Kollar that Docket PENN 2015-266, an unrelated which originated in Coal District 2, was not received or sent to the Solicitor's Office sometime in July 2015 during Ms. Neiderheiser's final week of employment as a CMS&H Assistant.
8. Since the Petition had not been filed timely for Docket No. PENN 2015-266, I decided to run a report for all cases transferred to the Solicitor's Office on or about the time Ms. Neiderheiser left her employment with MSHA to ensure that no other cases were similarly lost. During my search I discovered that Docket PENN 2015-260 had not been designated to the Solicitor's Office at that time.
9. On or about March 10, 2016, I contacted the Solicitor's Office regarding Docket No. PENN 2015-260. The Solicitor's Office stated that it had never received the case. Since Ms. Neiderheiser's last date of employment with MSHA was July 23, 2015, I could not get her input as to what may have happened with Docket No. PENN 2015-260.
10. I also reviewed the Excel spreadsheet and determined that Docket No. PENN 2015-260 was not included on this list. I searched through our e-mailed receipts and could not find an e-mail receipt from UPS showing that the case had been mailed to the Solicitor's Office. As a result of my review, I found no evidence that the case was ever sent to the Solicitor's Office or that a civil penalty petition was filed by Coal District 2.
11. Because the file for PENN 2015-260 could not be located, our office created a new case file for the docket. The new case file was mailed to the Philadelphia Solicitor's Office for litigation.

GX-1

In pertinent part, the Declaration of Rebecca L. Kollar is as follows:

1. I am currently employed by the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), as Secretary to the Assistant District Manager at the MSHA Coal District 2 ("Coal District 2"). I joined MSHA on October 15, 2006, when I was hired as a Coal Mine Safety and Health Assistant ("CMS&H Assistant").
2. On December 14, 2014, I was promoted to my current position. On or about March 23, 2015, April Neiderhiser was hired to replace me as a CMS&H Assistant. Ms. Neiderhiser was in this role until on or about July 23, 2015, when she resigned. I trained Ms. Neiderhiser as a CMS&H Assistant.
3. I am familiar with MSHA's civil penalty assessment process and the procedures of civil penalty proceedings before the Commission.
4. Coal District 2 typically receives an automated e-mail from MSHA's internal citation and case tracking software that a matter has been docketed at the Federal Mine Safety and Health Review Commission ("FMSHRC"). This e-mail alerts the CMS&H Assistant that a contest has been filed and whether a CLR or the Solicitor's Office will handle the matter. In either case, the CMS&H Assistant enters the docket number on an Excel spreadsheet.
5. I developed an Excel Spreadsheet to organize and maintain information about cases including petition deadlines. This spreadsheet automatically calculates the petition's due date. If a case is to be transferred to the Solicitor's Office, then the matter is entered in the spreadsheet. The procedure is for the case to be removed from the spreadsheet once a return receipt is e-mailed from United Parcel Services ("UPS") indicating that the package transmitting the case has been delivered.
6. I trained Ms. Neiderheiser how to populate the Excel spreadsheet, keep track of cases, file petitions, and mail cases to the Solicitor's Office.
7. On or about March 10, 2016, CMS&H Susan Sikora told me that she spoke to Regional Counsel Gayle Green regarding the status of Docket PENN 2015-260. The Solicitor's Office stated it never received the case. Ms. Sikora also informed me that she reviewed the Exel spreadsheet and could not locate the Petition for the Docket.

GX-2

Analysis

Adequate Cause

A short term employee, whose tenure at MSHA lasted only about 3 months, just before leaving the job apparently failed to respond to an automated e-mail from MSHA's tracking software that this case had been docketed at the Commission. What is known is that this docket was not entered into the Excel spreadsheet at Coal District 2, and this case was not mailed to the Solicitor's Office in order for a timely Petition to be filed. The Secretary contends this was a clerical error, an unusual oversight that occurred at the time of a change in personnel. Initially, I

note that the record does not suggest bad faith, intentional misconduct, or that the resulting delay was willful in nature. *Long Branch,* at 1991. Rather, the Secretary's characterization of the failure as inadvertent appears accurate. *Id.*

Respondent contends the Secretary's justification is not plausible and the explanation is superficial and does not meet the minimum requirements for "adequate cause". But the explanation provided is "non-frivolous." *Id*. Even if the employee had not been in the process of leaving the job, this was nothing more than simple error; either a missed e-mail resulting in no further processing, or if not missed, the inadvertent oversight of not entering the docket into the Excel spreadsheet and the further oversight of not mailing the case to the Solicitor's office. Under these circumstances the excuse is "facially plausible." *Id.*

Respondent makes much of the allegation that the failure of the Secretary to implement "checks and balances" amounts to "caprice". Referring to *PBS Coals* and *Long Branch,* the argument is essentially that the lack of improvements, safeguards and/or back-up systems is evidence of "mere caprice". However, neither case supports the allegation that such "checks and balances" must be implemented to protect operators. Nor does the record show that in designing and implementing the case tracking spreadsheet the District office personnel acted impulsively, on a whim or in dereliction of duties, but rather as discussed in *PBS Coals*, the system was intended to meet the need to handle a heavy caseload. *PBS Coals*, at 1516-17. That the system is not infallible is not controlling. As the Commission has observed, "dedicated public servants may stumble in the performance of their duties" *Long Branch*, at 1991. Further, that over about a ten year period with many transfers between entities a handful of cases might "slip through the cracks" or get "lost in the shuffle" hardly suggests a compelling reason for change, much less the dismissal of an enforcement proceeding. I would also observe it is not the function of the Commission to tell the Secretary how to administer his case tracking procedures.

I find there was adequate cause for the delay.

Actual Prejudice

Respondent argues it has suffered real prejudice. With the passage of time memories do fade, witnesses can become unavailable, and evidence may be lost or destroyed. But this is true in any long-delayed case and without information that the events have actually happened and will have a significant effect on the presentation of the case this presents only "inherent" prejudice. *Randy Howell*, 20 FMSHRC 556, 558-9 (May 1998) (ALJ). Where, as here, a mine has been idled, and employees have been transferred to other mines, there could be difficulties locating records and miner witnesses. However, there is no demonstration of an *unavailability* of witnesses or *loss* of records with supporting reasons given. *See, PBS Coals* at 1519.

Even where an important witness has left employment at the mine and will need to be found, the possible difficulty in contacting that person presents only potential prejudice. Indeed, just how this possible difficulty would prejudice Respondent is not explained. *Steve B. Rees*, 37 FMSHRC 1852, 1855 (Aug. 2015) (ALJ); *Randy Howell*, at 558, 559. Respondent must cite specific instances and provide specific facts to support difficulties locating evidence or a witness. *Dino Trujillo*, 35 FMSHRC 1485, 1487 (May 2013) (ALJ).

I find actual prejudice has not been shown.

Only where both parties carry their respective burdens is there a requirement to balance the public and private interests at stake. *Long Branch,* at 1996. Assuming, *Arguendo,* that prejudice had been shown, resolving competing interests requires consideration of a number of factors, including the length of the delay, the type of alleged violation and whether designated S&S or UWF, whether an accident was involved, or injury or death, and the number of persons potentially affected. *See, PBS Coals*, at 1521. Here, the Inspector issued a citation when he found that a system used to track miners had failed to operate in a section of the mine for several days. The Inspector designated the gravity as S&S, and determined that injury was highly likely and could be expected to be fatal to 35 persons. The alleged violation was also found to be UWF. If proven as written, this would be a very serious matter, suggesting a compelling interest in enforcement of the Mine Act Provisions. The delay of almost 8 months is significant, but not protracted. The balancing of interests is in favor of allowing the out-of-time filing of the Petition. I find the public interest in enforcement of the health and safety standards under the Mine Act outweighs the harm to the parties caused by the delay.

The Secretary of Labor's Petition for the Assessment of Civil Penalty is of record.

The Respondent's Answer to Petition is also of record.

WHEREFORE, the Secretary's Motion for Leave to File Late Petition is **GRANTED;** Respondent's Motion to Dismiss is **DENIED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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June 28, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. ARGUS ENERGY WV, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0158 A.C. No. 46-07809-426807 Mine: Kiah Creek Preparation Judge Moran

ORDER DENYING SETTLEMENT MOTION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Before the Court is the Secretary of Labor's Motion to approve settlement ("Motion"). If there was any doubt that the Secretary continues to seek an emasculated construction of section 110(k) of the Mine Act, neutering the Commission's role, this submission makes the intention clear. Despite the clear language of Section 110(k) that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission," the Secretary continues his effort to thwart the statutory language and Congress' expressed intent regarding the provision. Accordingly, the Motion must be **DENIED.** As the Secretary continues to balk at compliance with the statutory provision, this case is to be set for a prompt hearing.

A single citation is involved in this docket. The standard cited, 30 C.F.R. § 77.1606(a), titled, "Loading and haulage equipment; inspection and maintenance," provides at subsection (a), "Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator." 30 C.F.R. § 77.1606(a).

The issuing inspector's 104(a) citation stated, "[t]he spot mirror was busted out on the Komatsu HD 785 Haulage Truck, No. 137. Equipment defects affecting safety shall be recorded and reported to the mine operator. There was no pre-operational record completed and reported to the mine operator on this date for this piece of mobile equipment. This truck was being operated to haul overburden on mine property." Citation No. 8128099. The inspector marked the citation as S&S, with the gravity of the injury as "reasonably likely," the injury reasonably expected to be fatal, affecting 1 (one) person, with moderate negligence.[1] *Id*. The citation was assessed at $666.00. Secretary's Petition, Exhibit A. Thus, while the broken mirror triggered the

[1] The violation was abated upon installation of a new spot mirror.

inspector's inquiry, it was the failure to conduct the pre-operational inspection and to record the defect which is the gravamen of the citation.

The Secretary's Motion.

Oddly, though the Motion presented by the Secretary is described as being submitted, "[*p*]*ursuant* to Section 110(k) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") and Commission Procedural Rule 31" Motion at 1 (emphasis added), the Court finds that the submission is not *pursuant*[2] to that section, as it is not in accordance with its plain terms.

Instead, the Secretary informs that "[r]epresentatives for the Secretary and Respondent have discussed the alleged violation and MSHA's proposed penalty, and have agreed to settle the contested citation and penalty in the above-captioned docket as follows: Citation No. 8128099 shall be modified to delete the significant and substantial ("S&S") finding, change the gravity designation from reasonably likely to unlikely and reduce the penalty from $666.00 to $532.00." Motion at 1-2. The settlement represents a 20% reduction from the proposed penalty. The $666.00 figure was derived after applying a 10% reduction for good faith.[3]

The Secretary then announces that he

> has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which the alleged violation is resolved and can be used as a basis for future enforcement

[2] "Pursuant" is defined as "in accordance with." Webster's New World College Dictionary 4th ed. 1166; "'pursuant' means in conformity to," *Brotherhood of Ry and S.S. Clerks, Freight Handlers, Exp.& Station Emp. v. Railway Express Agency, Inc.*, 238 F.2d 181, (6th Cir. 1956).

[3] 30 C.F.R. §100.3(f) affords a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector."

> actions.[4] A resolution of this matter in which the violation is resolved is of significant value to the Secretary and advances the purposes of the Act.

Motion at 2.

The Motion continues that "[t]o assist the Commission in evaluating the appropriateness of the settlement under Section 110(i), the Secretary presents the following information in support of the penalty agreed to by the parties." *Id.* As the following "information" from the Secretary reveals, all that is presented by the Secretary is his conclusion that the "S&S and gravity determinations in the citation at issue shall be modified *as discussed above*." *Id*. (emphasis added).

That "discussion above" from the Secretary is free of any facts pertaining to the violation itself. Instead, it rests upon the Secretary's odds-making, upon his evaluation of "the value of the compromise, the likelihood of obtaining a better settlement and the prospects of coming out better or worse after a trial." *Id*.

The Commission's function, so says the Secretary, is limited to "whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification." Motion at 2-3. Thus, the Secretary pronounces that *he* "*has determined* that the S&S and gravity determinations in the citation at issue *shall be modified* as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc*., 18 FMSHRC 877 (1996)" The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a $134.00 reduction in the penalty from $666.00 to $532.00 is appropriate and supported by the reduction in the gravity findings." Motion at 2-3 (emphasis added). In the Court's estimation, the Secretary improperly conflates his presently existing prosecutorial discretion to vacate citations

[4] Even this non-informative basis is incorrect. The Secretary spins the tale that, even if he were to win at a hearing and even if the civil penalty was similar to the settlement, or the penalty was even greater, "it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which *the alleged violation is resolved and can be used as a basis for future enforcement actions*." Motion at 2 (emphasis added). However, the Motion itself seems to refute the notion that this settlement *can be used as a basis for future enforcement actions,* as the settlement terms provide, "[e]xcept for proceedings under the Act, Respondent contends that nothing contained herein is intended to be deemed an admission of a violation of the Act or regulations." Settlement Motion at 3.

without any explanation with the claim that the information supplied in settlements is also entirely within his discretion." ("*Mechanicsville*").[5]

Discussion

While it should be obvious that the Secretary elected to supplant CLR Trent as his representative with a Regional Counsel because the relatively small penalty involved makes it a superficially attractive vehicle to assert its broad claim of settlement authority, the subject of section 110(k) is not solely about money. Congress' overarching concern was about the safety and health of miners. The Commission took note of this as well in its *American Coal* decision, wherein it observed, "a settlement agreement involving violations of mandatory safety standards affects all miners working in the cited mine. Thus, the miners may be likened to a class affected by a settlement." *American Coal* at 1984. Here, the Secretary's Motion says *not a word* about the health or safety of the mining industry's "most precious resource – the miner." 30 U.S.C. § 801(a).

Further, even on the subject of the civil penalty amount itself, on numerous occasions, this Court has expressed that the amount of information it requires in support of a reduced penalty is proportional to the percentage reduction of that penalty. Significant reductions require more supporting facts than modest reductions. But, in either scenario, the facts are to be tied to the considerations identified in the gravity and negligence sections of the citation or one of the other statutory penalty factors that the Commission has the authority to assess, as identified in section 110(i) of the Act.

The Commission, both in its *Black Beauty* and *American Coal* decisions has made this quite clear. As it noted in *American Coal*, which also referenced its decision in *Black Beauty*, [6]

> the legislative history of section 110(k) reveals that Congress authorized the Commission to approve the settlement of contested civil penalties in order to

[5] The Secretary employs an expansive reading to the *Mechanicsville* decision and this Court does not believe it is on point. First, that case went to hearing; it was not a settlement. As the issuing inspector *never* marked the violation as S&S, the issue was whether the judge could find an S&S violation *sua sponte.* The Commission's decision was limited to that issue, holding, "we conclude that the judge lacked authority to find, *sua sponte*, that Mechanicsville's violation was S&S and we reverse the judge's conclusion that the violation was S&S." *Mechanicsville* at 882. However, the Commission affirmed "the judge's assessment of a $200 civil penalty." *Id.* It also noted that "[i]n contested civil penalty cases, the Mine Act requires that the Commission make an independent penalty assessment based on the statutory criteria of section 110(i) of the Act, 30 U.S.C. § 820(i)." *Sellersburg Stone Co*., 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 881 (internal citation omitted).

[6] *Black Beauty Coal Co*., 34 FMSHRC 1856, 1862 (Aug. 2012).

> ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.[7] 34 FMSHRC at 1862. The Commission and its Judges must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that "[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). The requirements to provide factual support in the settlement proposal and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979.

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016)

The Secretary's self-aggrandizement of power regarding settlements, despite Congress' clear statement that no proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled *except with the approval of the Commission*, should not come as a surprise.[8]

The essential problems with the Secretary's claim, if accepted, are twofold. First, it would render the statutory provision and the legislative history for section 110(k) nugatory. Second, in each instance, the Secretary could present such boilerplate language, untethered to any facts in support of a reduced likelihood of injury or illness, the nature of the expected injury, the number of persons affected or the degree of negligence.

[7] The Commission, in *American Coal*, noted that "[t]he Secretary downplays the significance of the legislative history. . . . However, Congress chose to explain the purpose of section 110(k) and the Commission's role in approving settlements in unusually specific terms. That legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so." 38 FMSHRC at 1986, n 5.

[8] The Secretary, it will be recalled, previously attempted an overreach in another matter, taking the position that he need not announce the basis for a claimed pattern of violations until *after* the conclusion of a hearing on such a charge. *Sec. v. Brody Mining LLC*, 37 FMSHRC 1914, 1928-29 (Sept. 2015).

Accordingly, for the foregoing reasons, and though the Secretary may believe he knows best in terms of the information needed for settlement approvals, Congress has determined otherwise by virtue of section 110(k). The Secretary may either submit an appropriately based settlement or prepare for a hearing.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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